APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 90-55201

THE VOLLRATH COMPANY,
Plaintiff-Appellant,
v.

SAMMI CORPORATION; KEN CARTER INDUSTRIES, INC.;
SAMMISA (AMERICA) CORP.,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California

Argued May 9, 1991

Submission Deferred May 9, 1991

Resubmitted Aug. 7, 1991

Submission Withdrawn July 27, 1993

Resubmitted Nov. 19, 1993

Decided Nov. 29, 1993

Before: HUG, NORRIS, and LEAVY, Circuit Judges.

OPINION

HUG, Circuit Judge:

Vollrath Company ("Vollrath") appeals the district court's order granting the defendants' motion for judgment notwithstanding the verdict in Vollrath's antitrust action. Vollrath contends there was sufficient evidence from which the jury could have concluded that the defendants violated sections 1 and 2 of the Sherman Antitrust Act by a predatory pricing scheme for stainless steel mixing bowls and by restricting output in Korea of stainless steel steamer cookware. Vollrath further contends there was sufficient evidence from which the jury could reasonably have concluded the defendants' pricing of the stainless steel mixing bowls violated the California Unfair Trade Practices Act. Vollrath also asserts that the district court erred when it barred Vollrath from amending its complaint to allege a claim for tortious interference with a contractual and business relationship. We affirm the district court's judgment.

I.

FACTS

The parties to this dispute include a number of corporations engaged in the manufacture and distribution of stainless steel mixing bowls and steamers. Vollrath, a Wisconsin company, was engaged in the business of importing stainless steel steamers and mixing bowls purchased from companies in Korea. Sammi Corporation ("Sammi") is a large Korean trading company that purchases a large variety of Korean goods for export to the United States and other countries. Among the products exported are stainless steel steamers (which are used in the kitchen on stove burners to cook food by steaming) and stainless steel mixing bowls (which are used in the kitchen for preparation and storage). Sammisa (America) Corporation ("Sammi America") is Sammi's United

States subsidiary, which is primarily engaged in the importation and sale of industrial steel products. Ken Carter Industries is a subsidiary of Sammi America. Ken Carter Industries imports and sell stainless steel steamers and mixing bowls exported by Sammi, which are the subject of this action.

Vollrath sued Sammi, Sammi America, and Ken Carter Industries for violating sections 1 and 2 of the Sherman Act and section 2(a) of the Clayton Act. Vollrath's complaint also included charges that the defendants violated California Bus. & Prof.Code §§ 17043 and 17044. Before trial, Vollrath attempted to amend its complaint so as to submit the additional charge that Sammi's output restriction gave rise to a claim of tortious interference under California law. However, on March 10, 1989, the first day of trial, the district court ruled that Vollrath would not be able to proceed with its tortious interference charge. The trial continued until April 5, 1989 and on April 11, 1989, the jury returned a verdict in favor of Vollrath on all of the federal and state claims. The jury awarded $9,478,676 in federal damages and $711,803 in state damages, making the total award of damages, after trebling the award on the federal claims, $29,147,831.

The defendants moved for a judgment notwithstanding the verdict ("JNOV") and for a new trial on July 17, 1989. On November 15, 1989, the district court informed the parties the JNOV motion would be granted but that the court would reserve judgments on the motion for new trial until the appeal from the JNOV was resolved. The court entered its judgment granting the JNOV motion on December 27, 1989. Vollrath filed a notice of appeal on January 22, 1990.[1]

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[1] Vollrath does not contest on appeal the granting of the JNOV on the claim under section 2(a) of the Clayton Act.

II.

JURISDICTION

Initially, we face a jurisdictional question. Rule 50(c) of Federal Rules of Civil Procedure requires that, when a motion for a new trial is joined with a motion for JNOV or is prayed for in the alternative, the district court is required to issue a conditional ruling on the new trial motion.[2] The district court in this instance did not issue an alternate ruling as required by Fed.R.Civ.P. 50 (c) but, rather, reserved its ruling on new trial until after the appeal from the JNOV was resolved. There is no doubt that this is error, but the question becomes whether this deprives us of appellate jurisdiction. Rule 50(c) does not specify the consequences for failure to issue a conditional ruling on the new trial motion. Spe-

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[2] Effective December 31, 1991, Rule 50 of the Federal Rules of Civil Procedure was amended. A motion for "directed verdict" is redesignated as a motion for "judgment as a matter of law," and if not granted before submission to the jury, it is deemed to have been submitted subject to a later determination of the legal questions upon a motion for renewal of that motion. Thus, the prior terminology of such a renewed motion as a motion for judgment notwithstanding the verdict ("JNOV") has been replaced as a renewal of the motion for judgment as a matter of law. The operation of Rule 50(c) remains unchanged, though the reference is now to a judgment as a matter of law rather than a judgment notwithstanding the verdict. Because the motions here involved were made prior to the 1991 amendment, we shall continue to use the term JNOV and quote the language from Rule 50(c) as it then existed. We note, however, that our interpretation of Rule 50(c) is equally applicable to the new terminology. We also note that the standard for granting the post-verdict motion is the same whether designated as a JNOV or a renewed motion for judgment as a matter of law. The change merely emphasizes that the grounds for the motion must have been stated in the motion made prior to submitting the case to the jury.

cifically, Rule 50(c) does not indicate that such a conditional ruling is a prerequisite to appellate jurisdiction.[3]

In considering whether the failure to comply with the requirements of Rule 50(c) deprives this court of appellate jurisdiction, we must consider Rule 50(c) itself and also Fed.R.App.P. 4(a)(4). The authorities prior to the 1979 amendment adopting Fed.R.App.P. 4(a)(4) are in general agreement that the district court's failure to rule on a new trial motion in the alternative is, at most, a procedural flaw that does not affect appellate jurisdiction.

In at least two cases, this court has previously addressed the merits of an appeal after explicitly noting that the trial court failed to issue a conditional ruling pursuant to Fed.R.Civ.P. 50(c). In both *Cokcrum v. Whitney*, 479 F.2d 84, 85 (9th Cir.1973), and *Gordon Mailloux Enterprises, Inc. v. Firemen's Insurance Co. of Newark*, 366 F.2d 740, 742 (9th Cir.1966), this court addressed the merits of an appeal notwithstanding the trial court's failure to issue a conditional ruling and then subsequently remanded the cause for a ruling on the new

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[3] Rule 50(c) at the time of the order provided:

Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

trial motion. This approach is consistent with that of other authorities which suggest it may be proper for a court of appeals either to rule on the merits of an appeal or to decide the pending new trial motion when a district court fails to comply with Rule 50(c). *See Motter v. Everest & Jennings, Inc.*, 883 F.2d 1223, 1229 (3d Cir.1989) (appeals court should treat new trial motion as granted); *Mays v. Pioneer Lumber Corp.*, 502 F.2d 106, 109-110 (4th Cir.1974), *cert. denied*, 420 U.S. 927, 95 S.Ct. 1125, 43 L.Ed.2d 398 (1975). *See also* 9 Wright & Miller, *Federal Practice and Procedure*, § 2539 (Supp.1993) (citing *Mays* with approval); 5A Moore's *Federal Practice* ¶ 50.12 at 50-105 (court may order either entry of judgment or a new trial or remand case to trial court for consideration of new trial motion).

A somewhat closer question is presented by the subsequent amendment to Fed.R.App.P. 4(a). That provision was amended in 1979 so as to include subdivision 4(a)(4), which provides:

> If a timely motion under Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial *or granting or denying any other such action.* A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. . . .

(Emphasis added.) Because the order granting the JNOV under Rule 52(b) is an order granting "any other such

motion," the time for appeal commences to run. A notice of appeal is not rendered premature because no alternate ruling on the motion for a new trial has been made. The express words of Rule 4(a)(4) do not require such a result and the policy behind the rules does not counsel that result.

Rule 4(a) prevents a party from appealing a judgment when a pending post-judgment motion renders the judgment non-final. Fed.R.App.P. Rule 4(a). Specifically, the Advisory Committee note to the 1979 amendment to Rule 4(a)(4) makes clear that the rule was intended to prevent the appellate court from assuming jurisdiction in a case "while the district court has before it a motion *the granting of which would vacate or alter the judgment appealed from.*" Fed.R.App.P. 4(a)(4) Advisory Committee's note to 1979 amendment (emphasis added). When a district court grants a motion for JNOV, that order is the final judgment of the court. The district court does not have before it a motion "the granting of which would vacate or alter that judgment." The judgment based on the JNOV could be altered only by reversal on appeal, not by any ruling by the district court.

We therefore conclude that we may properly exercise appellate jurisdiction over this case.

III.

PLAINTIFF'S LEGAL THEORIES

Vollrath's action was submitted to the jury on several legal theories. The theories argued on appeal are:

> (1) An attempt to monopolize in violation of section 2 of the Sherman Act, based upon
>
> > (a) Ken Carter's predatory pricing of stainless steel mixing bowls, and
> >
> > (b) Sammi's invoking design registration rights to prevent another exporter in Korea from exporting stainless steel steamers.

(2) Conspiracy to

(a) restrain trade in violation of section 1 of the Sherman Act, and

(b) monopolize in violation of section 2 of the Sherman Act.

(3) Violations of the California Unfair Trade Practices Act, Cal.Bus. & Prof.Code § 17000 *et seq.*

Vollrath also raises for the first time on appeal a contention that the restriction of output by Sammi was a "naked restraint of trade" and a *per se* violation of Section 1 of the Sherman Act. Vollrath also asserts as error the district court's order denying Vollrath's motion, on the eve of trial, to amend its complaint to allege a state law claim of tortious interference with a contractual and business relationship.

In reviewing a district court's order granting JNOV, we review the decision *de novo*, applying the same standard as the district court. *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir.1988). A JNOV is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's. *Venegas v. Wagner*, 831 F.2d 1514, 1517 (9th Cir.1987).

The district court, in a thorough and carefully reasoned 54-page unpublished opinion, analyzed the evidence presented in light of the governing law, and concluded that the evidence could not support the verdict and that a judgment for the defendants was required. We affirm essentially for the reasons expressed in that unpublished opinion.

IV.

ATTEMPTED MONOPOLIZATION

Vollrath's claims of attempted monopolization are based upon two theories: (1) that Ken Carter engaged in predatory pricing of stainless steel mixing bowls, and (2) that Sammi invoked Korean design registration rights to block another exporter in Korea from exporting stainless steel steamers. In order to establish an attempt to monopolize "a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan,* —— U.S. ——, ——-——, 113 S.Ct. 884, 890-91, 122 L.Ed.2d 247 (1993).

A. *Predatory Pricing of Stainless Steel Mixing Bowls*

Two prerequisites to recovery under section 2 of the Sherman Act for predatory pricing must be proved:

> 1. "[A] plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs."

Brook Group, Ltd. v. Brown & Williamson Tobacco Corp., —— U.S. ——, ——, 113 S.Ct. 2578, 2587, 125 L.Ed.2d 168 (1993) (footnote omitted).

> 2. "[T]he competitor had a . . . dangerous probability[] of recouping its investment in below-cost prices."

Id. at 2588.

Economic reality is that, generally, price reduction is the very essence of competition. Thus, care must be taken in drawing the line between pricing that enhances competition and predatory pricing that is designed to eliminate competition. The Supreme Court has noted that

predatory pricing is "rarely tried, and even more rarely successful." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589, 106 S.Ct. 1348, 1357, 89 L.Ed.2d 538 (1986). The reason is that, in order for the business entity to eliminate competition by pricing below cost, it must forego short-term profits long enough to drive competitors from the market and then maintain monopoly power long enough to recoup the losses and realize additional gain. *Id.* at 588-89, 106 S.Ct. at 1356-57. Thus, "the predator must make a substantial investment with no assurance it will pay off." *Id.* at 589, 106 S.Ct. at 1357.

In this case, the alleged predatory pricing relates to the stainless steel mixing bowls exported by Sammi and sold by Ken Carter. The basis for the claim is that Ken Carter sold the mixing bowls below its average variable cost. As the district court noted, the basic defect is that the plaintiff presented a mismatch of evidence to support the claim. It sought to show below-cost sales by Ken Carter as an independent entity by imputing costs from Sammi and Sammi America and Ken Carter as a combined unit. If Ken Carter is viewed as an independent unit, then we must consider only the costs actually incurred by Ken Carter to determine if it sold below its costs. If Ken Carter, Sammi, and Sammi America are considered as a combined unit, then the appropriate consideration is the costs of the combined group to determine if the combined group sold below its costs.

We first consider the claim viewing Ken Carter as an independent unit. Vollrath contends there was sufficient evidence from which the jury could have concluded that Ken Carter priced its stainless steel mixing bowls below average variable cost. At trial, Vollrath sought to show that during the period from June 1981 to May 1982, Ken Carter sold $2.8 million worth of Sammi products at prices which were approximately 28% below its variable costs.

The facts underlying Vollrath's claim are as follows: Prior to November 1981, Sammi America advanced over $1 million worth of merchandise to Ken Carter on credit. In November of 1981, Sammi America purchased Ken Carter. During the ownership transaction, the unpaid dept to Sammi America reached $3 million. In 1984, Sammi America advanced another $2 million for working capital. James Kim, from Ken Carter, testified that the unpaid debt was treated by the companies as investment capital which was not to be paid back. Vollrath objected to the characterizations of the transactions and offered the expert testimony of Dr. Buckley to show the average variable cost of the products sold by Ken Carter was higher than the company claimed.

Dr. Buckley's testimony does not support a finding that Ken Carter priced its product line of mixing bowls below the average variable cost, with the exception of one item in its product line. The testimony relied in large part on the concept of "imputed interest," which was an estimate of the cost of the funds made available to Ken Carter in order to permit Ken Carter to purchase inventory from Sammi. The crux of Dr. Buckley's testimony was that Ken Carter would have had to borrow money from other sources and pay for interest on the borrowed money in order to purchase the inventory.

Dr. Buckley's testimony, however, is insufficient as a matter of law. Even if Ken Carter did not pay interest on the funds or credit advanced, it would not mean that the average variable cost of the goods was higher. The absence of interest would only mean that Ken Carter received favorable treatment from Sammi, not that Ken Carter actually incurred a cost. Without proof that Ken Carter somehow incurred a cost, the concept of imputed interest is unsound. There was evidence that in 1983 and 1984 Ken Carter did sell one item of its product line below costs without considering Dr. Buckley's imputed interest. This was the five-piece mixing bowl set. This would be scant proof of an intent to monopolize.

The more serious flaw in the whole theory of viewing Ken Carter as an individual unit engaged in predatory pricing is that there was no possibility of Ken Carter achieving monopoly power by predatory pricing because it controlled only 10% of the market. There is no danger of monopoly power, and there certainly would be no hope of recouping losses from below-cost pricing.

If we consider Ken Carter as a part of an integrated entity with Sammi and Sammi America, both before and after its acquisition by Sammi America in 1981, there also is a lack of proof of predatory pricing. The evidence cannot sustain a finding that the integrated entity sold below its average variable costs because there was no evidence of Sammi's costs. Vollrath's entire argument is based upon the contention that the subsidiary corporation, Ken Carter, sold below its average variable costs and that this was sufficient for a jury to find predatory pricing. However, to show below-cost sales by the integrated entity must be proved. Furthermore, there was insufficient evidence from which the jury could reasonably conclude that there was a dangerous probability of achieving monopoly power. There also was no showing from the evidence that the defendants could have recouped any losses from below-cost pricing.

The Supreme Court recently stated that, "[D]emonstrating the dangerous probability of monopolization in an attempt case . . . requires inquiry into the relevant product and geographic market and the defendant's economic power in that market." *Spectrum Sports,* —— U.S. at ——, 113 S.Ct. at 892. As the district court noted, "No matter how the market is defined—and certainly plaintiff did not define it—the ease of entry into it and the number of potential paricipants on every level of it abundantly demonstrates that recoupment of the monopolist would never be possible. This is the classic case for the application of *Matsushita.*" Vollrath's expert testimony was not based upon sufficient evidence adduced at trial concerning market power or market facts to justify a con-

clusion that there was a dangerous probability of recouping an investment in below-cost prices. As noted in the *Brown & Williamson* decision:

> When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them.

Brown & Williamson, —— U.S. at ——, 113 S.Ct. at 2598 (citation omitted).

B. *Design Rights to Steamers*

The evidence at trial showed the existence and function in Korea of the Korean Holloware Association. This association through a 13-member Pattern and Design Registration Committee grants pattern and design registration rights for particular products to Korean manufacturers and trading companies based on shape, appearance, and color of the products. The 13 members of the committee are from the following groups: four members from manufacturers, four members from trading companies, one member from the Korean Holloware Association, one member from the Association of patent attorneys, and three members from Korean government organizations.

A trading company, such as Sammi, can only hold a pattern design right jointly with a manufacturer. Sammi was a co-holder of a pattern and design registration with a manufacturer, Dae Sung, for certain stainless steel steamers in the years 1983 and 1984. Vollrath tried to have its steamer design registered but could not do so because a similar design was already registered to Sammi and Dae Sung.

Sammi and Dae Sung sought to invoke their design registration rights to prevent another trading company,

Dae Lim, from shipping its steamers. This lasted for only a three-month period from October, 1983 to January, 1984. Sammi and Dae Sung, although still claiming infringement of their design rights, waived their rights and Vollrath received steamers in early January, 1984.

This three-month assertion of Korean design rights constitutes Vollrath's sole claim for attempted monopolization of a market Vollrath contended was the stainless steel steamer market. There are many evidentiary deficiencies in establishing this claim, which the district court pointed out. There was no evidence that the assertion of design rights in Korea was done with an intent to monopolize a stainless steel steamer market in the United States. It was also highly doubtful that stainless steel steamers constituted a relevant market. Vollrath's expert testified that these steamers could be treated as a product distinct from other steamers, such as those made from aluminum or other materials, and "in a sense" could be viewed as constituting "a market of their own." This is hardly a firm conclusion of a separate market for stainless steel steamers. Furthermore, even this inconclusive opinion was not reasonably based on sound data. There was no detailed examination of market data or any analysis of cost, comparable usage, or comparative features of other competing products. The opinion was based on limited anecdotal evidence.

The most significant deficiency in the claim, also noted by the district court, is that no evidence of a dangerous probability of monopoly power in the United States resulted from this three-month delay in shipment of steamers to Vollrath. This is particularly true in light of the Supreme Court's recent decisions in *Spectrum Sports* and *Brown & Williamson*. There was insufficient evidence concerning the relevant product and geographic market and Sammi's economic power in that market.[4]

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[4] Vollrath also argues on appeal that Sammi and nonparty Dae Sung engaged in a naked restraint of trade in Korea and that this

V.

CONSPIRACY CLAIMS

The district court properly held that there could be no conspiracy among Sammi, Sammi America, and Ken Carter, after the latter's acquisition, relying on *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). Under *Copperweld*, companies under common ownership and control cannot initiate Sherman Act conspiracy violations among themselves. Vollrath argues that *Copperweld* is inapplicable because the evidence demonstrates Ken Carter was engaging in predatory pricing even before Sammi, Sammi America, and Ken Carter were combined.

Vollrath's claim of conspiracy in the district court was based solely on an alleged conspiracy among Ken Carter, Sammi, and Sammi America and was submitted to the jury on that basis. On appeal, Vollrath seeks to expand the number of alleged conspirators to non-defendants, Dae Sung and the Korean Holloware Association. Here again, we decline to consider this expanded allegation of a conspiracy when asserted for the first time on appeal. *See Johns-Manville*, 745 F.2d at 1221.

We are thus concerned with whether there was a conspiracy among Sammi, Sammi America, and Ken Carter before Ken Carter became a subsidiary of Sammi America. Vollrath sought to prove that Sammi America acquired Ken Carter for the purpose of launching a predatory pricing program. The district court concluded that the record does not support any inference of an anti-competitive conspiracy prior to Ken Carter's acquisition. Although there were advances of credit for merchandise sold by Sammi and loans from Sammi America, and

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constituted a *per se* violation of section 1 of the Sherman Act. This theory was not presented in the district court, and we decline to consider it on appeal. *See Kline v. Johns-Manville*, 745 F.2d 1217, 1221 (9th Cir.1984).

Sammi dealt with Ken Carter as supplier and distributor, the district court held that there was no evidence of anti-competitive purpose. Vollrath contends that Sammi's motive before and after acquiring Ken Carter was to engage in below-cost pricing so as to monopolize the stainless steel mixing bowl market.

It is worth repeating the requirements to establish such a competitive injury as set forth by the Supreme Court in *Brown & Williamson:*

> First, a plaintiff seeking to establish competitive injury from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.
>
> . . . .
>
> The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.

—— U.S. ——-——, 113 S.Ct. at 2587-88.

For the reasons earlier expressed, there was insufficient evidence of below-cost pricing for the Sammi group because the costs for the Sammi group were never proved. Sammi was the alleged prepetrator and beneficiary of such a conspiracy; therefore, the costs of the whole group are the relevant costs.

More significantly, for the reasons earlier expressed, there is insufficient evidence to support a conclusion that there was a reasonable prospect or a dangerous probability that Sammi could have recouped the losses from any below-cost pricing. There was no evidence analyzing the nature of the market, its participants, ease of entry, and the defendants' ability to lessen or destroy competition in that market.

VI.

VIOLATION OF CALIFORNIA LAW

Vollrath next contends there was sufficient evidence showing that the Sammi group violated the California Unfair Trade Practices Act.

The Cal.Bus. & Prof.Code § 17043 prohibits the sale, within the state, of any product at less than the product's cost for the purpose of injurying competitors or destroying competition. Similarly, Cal.Bus. & Prof. Code § 17044 prohibits the use of a "loss leader." [5] Vollrath did not present any evidence to the jury that Sammi, Sammi America or Ken Carter intended to sell or actually made any below-cost or loss-leader sales in California. The district court properly granted JNOV on this claim.

VII.

MOTION TO AMEND COMPLAINT

Vollrath contends the district court erred when it denied Vollrath's motion to amend its complaint to include a claim for tortious interference with a contractual or business relationship. This contention is meritless.

A motion for leave to amend is addressed to the sound discretion of the district court. *See Thomas-Lazear v. FBI*, 851 F.2d 1202, 1206 (9th Cir.1988). Here, Vollrath waited until almost a year after being reinstated as a party to the case before attempting to amend the complaint. Additionally, by the time Vollrath attempted to amend the complaint, the discovery cutoff date had already passed. The district court did not abuse its discretion when it rejected the amendment as untimely. *See id.* at 1206-07.

The district court's judgment is AFFIRMED.

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[5] Cal.Bus. & Prof.Code § 17030 defines a "loss leader" in part as: "any article or product sold at less than cost: (a) Where the purpose is to induce, promote or encourage the purchase of other merchandise; . . . (c) Where the effect is to divert trade from or otherwise injure competitors."

APPENDIX B

U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 85-820 MRP

THE VOLLRATH CO.

v.

SAMMI CORP., SAMMI (AMERICA) CORP., and
KEN CARTER INDUSTRIES, INC.

Filed December 20, 1989

MEMORANDUM OF DECISION

PFAELZER, D. J.: Plaintiff the Vollrath Company ("Vollrath") is a Wisconsin corporation; Vollrath's Consumer Products Division was an importer and distributor of stainless steel hollowware [1] in the United States. Defendant Sammi Corporation ("Sammi") is a Korean steel manufacturer and trading company that, in one of its lines of business, exports stainless steel hollowware. Defendant Sammi (America) Corporation ("Sammi America") a Washington corporation and a wholly owned subsidiary of Sammi. Defendant Ken Carter Industries, Inc., is a New York corporation and a wholly owned subsidiary of Sammi America; Ken Carter, like Vollrath, was an importer and distributor of stainless steel hollowware in the United States. Vollrath withdrew from the

[1] Hollowware is specialty cookware used in the kitchen for food preparation and storage; hollowware includes mixing bowls, colanders, roasters, steamers and similar accessories.

stainless steel hollowware market in 1984 and subsequently filed this action, alleging that the anticompetitve acts of defendants caused it to exit the market.

This action was tried to a jury on several legal theories: (1) conspiracy to restrain trade under section 1 of the Sherman Act, 15 U.S.C. §§ 1, (2) conspiracy to monopolize under section 2 of the Sherman Act, 15 U.S.C. §§ 2, (3) attempt to monopolize under section 2 of the Sherman Act, 15 U.S.C. §§ 2, (4) price discrimination under section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), and (5) violations of the California Unfair Trade Practices Act, Cal. Bus. & Prof. Code § 17000 *et seq.* After seventeen days of trial, the jury returned a verdict against defendants Sammi and Ken Carter as to all claims, and against defendant Sammi America as to the Sherman Act claims only. The jury awarded damages of $9,478,676 for the federal claims and $711,803 for the state claims, making the total award of damages, after trebling the federal claims, $29,147,831. Defendants moved post-trial for judgment notwithstanding the verdict or in the alternative for a new trial or remittitur.

I. *Facts*

Defendant Sammi's business is located in Korea. Its affiliate Sammi Steel supplies raw steel to small Korean manfacturers to construct mixing bowls and other hollowware items. Stipulated fact 30.[2] These small manufacturers in turn supply Sammi, in its capacity as a trading company, with the finished stainless steel hollowware for export. There were at least 25 to 45 manufacturers of stainless steel hollowware in Korea in the mid-1980's. Record at 3PM-96; 6-10. At the same time, there were 20 to 50 exporters of stainless steel hollowware in Korea.

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[2] All references to stipulations of the fact refer to this Court's "Stipulation of Facts" as read to the jury and filed April 5, 1989.

Of this number, there were three major exporters, Sammi being the largest.[3] Record at 3PM-95-99; 6-11.

Both Vollrath[4] and Ken Carter purchased their stainless steel hollowware from Korea and competed to sell it to large retailers in the United States, such as Sears or Target. Stipulated facts 26 and 27. Korean trading companies other than Sammi also sold stainless steel hollowware directly to retailers in the United States.[5] Stipulated fact 27.

Prior to November 6, 1981, Ken Carter had no legal affiliation with Sammi or Sammi America. However, in this period before November 1981, Ken Carter did a substantial amount of business with Sammi, accumulating a debt of close to $2 million to Sammi for stainless steel hollowware purchased on open credit terms. Moreover, on a number of occasions Ken Carter held itself out to the American extension of Sammi[6] or Sammi America.[7] On November 6, 1981, Sammi America acquired Ken Carter, and thereafter Ken Carter operated a wholly owned subsidiary of Sammi America.[8] According to de-

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[3] The other two major exporters of stainless steel hollowware were Hai Dong and Daewonsa.

[4] Prior to 1982, Vollrath manufactured stainless steel kitchenware in the United States. During the time relevant to this lawsuit, however, Vollrath was exclusively an importer and distributor of products manufactured outside of the United States. Stipulated fact 5.

[5] The evidence sustains defendants' contention that there are many market participants operating on multiple levels of distribution.

[6] At least one document listed Sammi's Korean address.

[7] A number of invoices, documents and letters to retailers from 1980 and 1981 identified Ken Carter as a "Division of Sammisa (America) Corp."

[8] Sammi America purchased all the stock of Ken Carter from Kenneth Min, Ken Carter's president and sole shareholder, for $50.00. Under the terms of the acquisition, Sammi America agreed

fendants, Sammi America acquired Ken Carter in order to protect the large debt owing to Sammi and Sammi America, and to avoid certain limitations imposed by Korean law as to the amount of capital permitted to be invested in an unaffiliated company abroad. Plaintiff accepted defendants' description of the limitations imposed by Korean law, but argued that Sammi America acquired Ken Carter to implement a predatory pricing scheme aimed at driving Vollrath and other competitors from the United States market for distribution of stainless steel hollowware. Sammi and Sammi America are said to have enabled Ken Carter to set predatory prices by extending low-interest and interest-free credit and loans to it.

Although the record does not disclose the details of defendants' post-acquisition interrelationships, it does contain uncontroverted evidence sufficient to permit an understanding of the basic structure of the trasactions between Sammi, Sammi America and Ken Carter. After Sammi America's acquisition of Ken Carter, Ken Carter purchased all of its stainless steel hollowware from Sammi or Sammi America.[9] Stipulated facts 11 and 17. All of Sami's hollowware sales to Ken Carter were made on "documents against acceptance" (hereinafter "D/A") terms. Plaintiff's exhibit 486 at 41. *Cf. Aimor Elec. Works, Ltd. v. Ohama Nat'l Bank*, 727 F.2d 688 (8th Cir. 1984) (explaining documents against acceptance terms). Under the D/A contracts, Ken Carter was not required to make immediate payment for the hollowware

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to release Min from his personal guarantee on the $1.6 million debt owing to Sammi America. The acquisition also provided for the resignation of the officers and directors of Ken Carter. Under Sammi America's management, Ken Carter entered into a two-year employment agreement with Min, who became Ken Carter's marketing director. Stipulated facts 15 and 16.

[9] Ken Carter purchased hollowware from Sammi America on letter of credit terms until sometime in 1982. There was no evidence as to whether Ken Carter incurred any interest costs from these purchases. Plaintiff's exhibit 486 at 49.

purchased from Sammi. Instead, Sammi and Ken Carter would agree to the quantity and price of hollowware to be shipped, and to a date for payment, ranging from 30 to 180 days after receipt of the goods. Sammi would tender the bills of lading and the bills of exchange to its negotiating bank in Korea. The Korean bank then would forward the documents to its collecting bank in the United States. When Sammi shipped the hollowware and Ken Carter accepted the bills of exchange, the collecting bank would endorse the bills of lading to allow Ken Carter to take delivery of the goods.

Ken Carter's payments were tendered to the collecting bank in the United States. Ken Carter could only obtain an extension of the payment date with the approval of the banks; to seek an extension, Ken Carter would contact the collecting bank in the United States, and the collecting bank would seek approval from the negotiating bank in Korea. Plaintiff's exhibit 486 at 45-46. Although there is no evidence as to what it cost Sammi to make these D/A terms available to Ken Carter, Sammi did include a charge for interest in its invoice price of the goods to Ken Carter. Plaintiff's exhibit 486 at 43.

Plaintiff established that Ken Carter often did not have sufficient funds to make the D.A. payments to the collecting bank on a timely basis. To meet the required payments, Ken Carter secured loans from Sammi America. James Kim, who was president of Ken Carter, was the sole witness who testified as to the terms of those loans. Kim stated that Sammi America did not require interest payments on any loans made in 1983, and that Sammi America charged Ken Carter interest at prime plus a half-point on $2.1 million of loans made in 1984. Record at 10-86, 98; 8-216. Plaintiff argued that all along, the schedule for D/A payments, on shipments by Sammi, and the loans from Sammi America amounted to a continuing "big bankroll" from Korea permitting Ken Carter to underprice its competitors. Record at 6-162. Never-

theless, plaintiff did not claim that Ken Carter engaged in any predatory pricing until 1983. At trial, plaintiff's theory was that Ken Carter priced its products below cost throughout 1983 and 1984, and that finally its pricing was so low that Vollrath could no longer compete.

Vollrath also sought to show that in late 1983, when it was feeling the pressure of Ken Carter's prices, Sammi prevented it from exporting a stainless steel steamer[10] from Korea to the United States. Vollrath ordered this steamer, made to its specifications, from Daelim, a Korean manufacturer. Sammi, as a trading company, and Daesung, a hollowware manufacturer, were co-owners of Korean design registration rights for a stainless steel steamer sold by Ken Carter. These design rights had been granted to them by the Korean Metal Flatware Association's Committee on Design Registration which, according to plaintiff, is an association of private companies empowered to grant export licenses.[11] From October 1983 until

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[10] Steamers are used on the top of the stove to steam vegetables, rice and seafood. Stipulated fact 25.

[11] Plaintiff relied on the declaration of Howard Kim, Ken Carter's sales manager, to prove that the Korean Metal Flatware Association was a non-governmental entity. Plaintiff's exhibit 783. Mr. Kim stated that the Association was a self-regulating organization with no governmental or legal powers and that registration of design rights did not confer any property rights on the holder, or entitle the holder to protection. Rather, Kim stated, "[The Association] is merely an administrative priority for exporters." Plaintiff's exhibit 783 at 3.

Defendants insist that Mr. Kim's description of the Association misstates the role of the Korean government. To contradict Mr. Kim's declaration, defendants called Mr. Park, a member of the Association, to testify at trial. Mr. Park stated that the Korean Metal Flatware Association is a quasi-governmental organization: the Association was established with government approval and three of the thirteen representatives were government officials. Record at 11-150, 153. The remaining representatives come from private industry: officials of manufacturing and trading companies. Although the Court found Mr. Park's testimony more credible than

January 1984, Sammi invoked its design rights to prevent Daelim from shipping the Vollrath steamer to the United States.[12] Although the steamers were ultimately shipped to Vollrath with Sammi's consent, Vollrath claims to have suffered this three or four month delay during a time period critical to its survival in the hollowware market.[13]

In May 1984, according to the testimony of several employees of Vollrath's Consumer Product Division, Vollrath could no longer compete and made the decision to withdraw from the stainless steel hollowware business. Vollrath terminated all operations with respect to stainless steel hollowware by the end of that year. Record at 2-106 to 110; 3-54.

II. *Standard of Review.*

A motion for judgment notwithstanding the verdict should be granted where,

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Mr. Kim's testimony, since Mr. Park actually served on the Association board, the Court accepts, for the purpose of the Motion for Judgment Notwithstanding the Verdict, that the Association was non-governmental.

[12] Plaintiff's witness Warren Kashuk, a buyer for Metro Industries, testified that Mr. Nam, a section chief in Sammi's export division, stated that Sammi was "not going to let [Daelim] ship the [Vollrath steamer] to the United States . . . . Because [Sammi has] this design patent registration on the quart unit." Record at 3PM-58.

[13] Some of plaintiff's witnesses testified that the timing of the steamer blockage was critical because Christmas is the important shopping season for hollowware. Record at 2-82 to 83. After Carol Storn, Vollrath's marketing director for the Consumer Products Division, revealed that most of Vollrath's orders would not have been available until well after the Christmas shopping season, however, Vollrath's attorneys abandoned this argument. Record at 4B-120; Record of Proceedings on April 3, 1989 at 37. It is now argued that the delay was critical because it harmed Vollrath's reputation as a supplier.

> the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.

Walker v. KFC Corp., 728 F.2d 1215, 1223 (9th Cir. 1984) (citations omitted). Although judgment notwithstanding the verdict is an extreme remedy, a court may properly enter judgment notwithstanding the verdict where the jury verdict is not supported by substantial evidence. *The Jeanery, Inc. v. James Jeans, Inc.* [1988-1 TRADE CASES ¶ 67,988], 849 F.2d 1148, 1151 (9th Cir. 1988).

III. *Attempt to Monopolize.*

To succeed on a claim of attempted monopolization, the plaintiff must prove four elements: (1) specific intent to control prices or eliminate competition, (2) anticompetitive conduct directed at accomplishing the unlawful objective, (3) a dangerous probability of success, and (4) causal antitrust injury. *Marsann Co. v. Brammall, Inc.* [1986-1 TRADE CASES ¶ 67,072], 788 F.2d 611 (9th Cir. 1986). The Ninth Circuit has recognized that these elements, while distinct requirements for the proof of attempted monopolization, necessarily interact. Because of the difficulty of proving anticompetitive intent directly, the Ninth Circuit has repeatedly held that proof of 'conduct [which] is predatory or clearly in restraint of competition" may support an inference of specific intent. *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.* [1989-1 TRADE CASES ¶ 68,592], 875 F.2d 1369, 1378 (9th Cir. 1989).

The Ninth Circuit has also circumscribed the necessity of showing a dangerous probability of success. Because this element is "not designed as a means of screening out cases of minimal concern to antitrust policy," *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*

[1981-2 TRADE CASES ¶ 64,229], 668 F.2d 1014, 1029 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982), a plaintiff is not required to show a "probability of actual monopolization." *Forro Precision, Inc. v. International Business Machines Corp.* [1982-1 TRADE CASES ¶ 64,708], 673 F.2d 1045, 1059 (9th Cir. 1982), cert. denied, 471 U.S. 1130 (1985). Rather, this element is 'a way of gauging more accurately the purpose of a defendant's actions." *William Inglis,* 668 F.2d at 1029. Thus, a dangerous probability of success may be inferred (1) from direct evidence of specific intent to control prices or eliminate competition together with proof of conduct directed at accomplishing that purpose, or (2) from evidence that the defendant's conduct was predatory or clearly in restraint of competition. Vollrath claims to have shown two types of conduct by the defendants which were predatory or clearly in restraint of competition: below cost pricing by Ken Carter and blockage of steamer shipments by Sammi.

A. *Predatory pricing.*

1. *Legal standard.*

Since lowering prices can be either the essence or the antithesis of competition, courts must "distinguish predatory price cuts intended to eliminate competition from legitimate price cuts designed to meet or beat competition." *Transamerica Computer Co. v. International Business Machines Corp.* [1982-83 TRADE CASES ¶ 65,218], 698 F.2d 1377, 1384 (9th Cir.), cert. denied, 464 U.S. 955 (1983). To assess whether pricing is predatory, a court must recognize the economic reality that predatory pricing is "rarely tried, and even more rarely successful." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* [1986-1 TRADE CASES ¶ 67,004], 475 U.S. 574, 589 (1986). This reality stems from the fact that to succeed at below cost pricing, a would-be monopolist must forgo short-term profits long enough to drive competitors from the market, and then maintain monopoly power long enough

to recoup the losses and realize additional gain. *Id.* at 588-89.

> Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, the predator must make a substantial investment with no assurance that it will pay off.

Id. at 589 (citations omitted).

To distinguish competitive from predatory pricing, then, courts have focused on one or more of the three kinds of evidence. See *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.* [1989-2 TRADE CASES ¶ 68,706], 881 F.2d 1396 (7th Cir. 1989) (collecting cases). First, some courts look to the pricing firm's intent, inquiring whether the defendant hoped that its prices would eliminate competition and secure a monopoly. Second, some courts employ a comparison of the defendant' cost and prices: prices below some appropriate measure of cost may reveal a scheme to sacrifice current profits in the hope of eliminating competition and reaping monopoly gains later. Third, some courts focus on the back end of the predatory pricing scheme, inquiring whether the monopolist could later raise its prices to recoup its losses and realize monopoly gains. In focusing on recoupment, courts consider primarily evidence of market structure and the possibility of maintaining monopoly prices for a comfortable period without inviting in new entrants whose costs are as low as or lower than those of the monopolist.

The two most recent predatory pricing decisions of the Supreme Court focus on recoupment.[14] At least one court

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[14] *Cargill, Inc. v. Monfort of Colorado, Inc.* [1986-2 TRADE CASES ¶ 67,366], 479 U.S. 104, 119-20 n.15 (1986) ("in order to succeed in a sustained campaign of predatory pricing, a predator must be able to absorb the market shares of its rivals once prices have been cut . . . . It is also important to examine the barriers to entry in the market because without barriers to entry it would presumably

has read these decisions to require a plaintiff alleging predatory pricing ot establish, at a minimum, that the market structure would permit the would-be monopolist to maintain monopoly power long enough to recoup its losses. See *A.A. Poultry Farms, supra.*[15] In the Ninth Circuit, however, courts are instructed to look at the price-setting firms' intent, and to compare the firm's cost and prices, in determining whether a price is predatory.[16] *William Inglis,* 668 F.2d at 1034. In the Ninth Circuit, the ultimate standard of predation turns on the intent of the price setting firm; to prevail on a claim of predatory pricing.

> a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to

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be impossible to maintain supracompetitive prices for an extended time."); and *Matsushita, supra.*

[15] In *A.A. Poultry Farms, supra,* the Seventh Circuit adopted the approach that in a predatory pricing case, it is plaintiff's initial burden to establish that recoupment is possible. The court criticized the use of cost-price comparisons because of the complexity of determining what should be the appropriate measure of cost, and the difficulty of calculating costs. The court stated:

"It is much easier to determine from the structure of the market that recoupment is improbable than it is to find the cost a particular producer experiences in the short, middle, or long run (whichever proves pertinent). Market structure offers a way to . . . avoid the imponderable questions that have made antitrust cases among the most drawnout and expensive types of litigation. Only if a market structure makes recoupment feasible need a court inquire into the relation between price and cost."

881 F.2d at 1401.

[16] The law of attempted monopolization in this Circuit makes it unnecessary for plaintiffs to concern themselves with considerations of recoupment and market power in predatory pricing cases. Under the law of attempted monopolization, a plaintiff need not offer proof of market power or of a dangerous probability of success where a defendant's conduct is predatory. See *supra* Part II. In a predatory pricing case, a plaintiff can establish that the defendant's conduct is *prima facie* predatory by showing that defendant set its prices below average variable cost.

> discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power.

Id. at 1035.

In applying this standard, this circuit employs a cost-based test to allocate the burden of proof on the issue of predation. *Transamerica Computer,* 698 F.2d at 1386. If a plaintiff establishes that the defendant set its prices below its average variable costs,[17] the defendant bears the burden of showing that the prices were not predatory. If the plaintiff establishes that the prices were below average total cost, but above average variable cost, the plaintiff bears the burden of showing that the prices were predatory. And, if defendant's prices were above average total cost, the plaintiff must show, by clear and convincing evidence, that the prices were predatory. *Id.* at 1386-88; *William Inglis,* 668 F.2d at 1035-36. Although this cost-based test is a starting point in analyzing a firm's pricing behavior, the presumptions created by the test are rebuttable.[18] The ultimate standard remains whether defendant, viewing its position in the market, set its prices

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[17] Both parties' economic experts defined variable costs as those costs which rise in direct proportion to sales. Record at 6-117; 12-176. The determination as to which costs are fixed and which costs are variable is a factual determination. *William Inglis,* 668 F.2d at 1038.

[18] Although the law of attempted monpolization seems to eliminate considerations of market power after plaintiff offers evidence of pricing below average variable cost, in order for a defendant to effectively rebut the inference of predation, defendant must be able to place market power, recoupment and a dangerous probability of success in issue.

A price is only predatory "if its *anticipated benefits* depended on its tendency to eliminate competition." *William Inglis,* 668 F.2d at 1034 (emphasis added). Thus, the most effective way for the defendant to rebut the presumption that its below average variable cost pricing was predatory is by showing that no reasonable participant in the market could expect to maintain monopoly power long enough to reap any substantial monopoly gains.

in the hope that competition would be eliminated, allowinf defendant to reap monopoly profits.[19]

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[19] Despite the focus on cost-price comparisons as a method to determine the intent of the price-setting firm, the Ninth Circuit's predatory pricing decisions implicitly recognize that a showing of market power and the possibility of recoupment are essential to a predatory pricing claim. Rather than require a plaintiff to overcome the initial hurdle of proving that recoupment is possible, as in the Seventh Circuit, see *A.A. Poultry Farms, supra*, however, the Ninth Circuit has considered market power less explicitly, invoking the requirement in cases where a finding of predation is inconceivable given the structure of the relevant market.

In *Janich Bros., Inc. v. American Distilling Co.* [1978-1 TRADE CASES ¶ 61,826], 570 F.2d 848 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978), for example, the court found that a defendant which priced below cost on half gallon bottles of gin and vodka did not act predatorily. Casting the concerns of market power in the guise of product definition, the court held that in a predatory pricing case.

"the product must be such that if predatorily priced, rivals are likely to be driven out of the market or excluded, allowing the [defendant] to raise prices."

Id. at 856. Since below cost pricing of half gallon bottles was unlikely to drive competitors from the market, the court affirmed a directed verdict for defendant. The Ninth Circuit has occasionally recognized the importance of market power and recoupment in defining predatory pricing. *Transamerica Computer*, 698 F.2d at 1384 ("[p]redatory pricing occurs when a company *that controls a substantial market share* lowers its prices to drive out competition so that it can charge monopoly prices, and reap monopoly profits, at a later time.") (emphasis added).

At least one district court in this circuit, recognizing that market power and recoupment are the keys to predatory pricing, has implicitly adopted the showing of market power as an essential element of a predatory pricing case. *In re Air Passenger Computer Reservation Sys. Antitrust Litig.* [1988-2 TRADE CASES ¶ 68,316], 694 F.Supp. 1443, 1469-70 (C.D. Cal. 1988) (allegation of predatory pricing makes no economic sense unless alleged would-be monopolist has a significant market share and barriers to entry in market are low).

If Vollrath were required to show that Ken Carter could have maintained a monopoly over the import/distribution stage of the United States hollowware market long enough to recoup losses,

2. *Plaintiff's proof.*

As evidence that Sammi, Sammi America and Ken Carter intended to control prices or eliminate competition, Richard Hiteman, a Vollrath employee, testified that:

> Mr. Min [Ken Carter's vice-president of sales and marketing] . . . stated directly to me [at a trade show] that I better get out of this business because I can't make any money at all.

Record at 4-73. Although Min's ambiguous statement could be construed as an expression by Ken Carter of an intent to eliminate Vollrath as a competitor, "the intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation." *Airweld, Inc. v. Airco, Inc.* [1984-2 TRADE CASES ¶ 66.197], 742 F.2d 1184, 1192 (9th Cir. 1984), cert. denied, 469 U.S. 1213 (1985) (citations omitted) (evidence that defendant's officials targeted plaintiff's accounts and stated that defendant would increase market share "any way it could" is not substantial evidence of specific intent). Evidence of specific intent must reveal an intent to vanquish the rival "through unfair or predatory means." *William In*

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plaintiff's predatory pricing claim would fail as a matter of law. In general, monopolization of the distribution stage of most markets is considered to be implausible. P. Areeda & H. Hovenkamp, *Antitrust Law: 1988 Supplement* 492-93 (1988). Even if Ken Carter were to succeed in driving out the several importer/distributors with which it competed, Ken Carter could not possibly recoup its losses and raise prices. It is undisputed that the retailers who were Ken Carter's customers could, and in fact did, purchase hollowware directly from Korean trading companies other than Sammi. These retail customers could, then, prevent any drastic increase in Ken Carter's prices.

Although plaintiff's expert, Dr. Shepherd, testified that the hollowware distribution market had "moderate" entry barriers, Dr. Shepherd based his opinion on the fact that there were no new entires into the market after Vollrath's exit. Entry barriers must be measured at the time of supra-competitive prices. *Cargill, Inc.*, 479 U.S. at 120, n.15.

glis, 668 F.2d at 1028. Having no direct evidence of such an intent on the part of any of defendants, Vollrath attempted to prove predatory conduct from which the necessary inference of intent could be drawn.

Vollrath's theory of predatory conduct treated Sammi, Sammi America and Ken Carter as together engaged in an attempt to monopolize the market for the distribution of stainless steel holloware in the United States. Plaintiff argued that, even before Sammi America's acquisition of Ken Carter, but certainly following it, Sammi, Sammi America and Ken Carter "acted in a manner which inexorably linked them together." Plaintiff's Opposition to Motion for JNOV at 46. Specifically, plaintiff contended that Sammi funded the predatory pricing scheme by extending credit to Ken Carter through the favorable payment schedule provided by D/A contracts. Sammi America is also claimed to have funded the predatory scheme by extending low interest and interest free loans to Ken Carter to meet the D/A payments. Ken Carter, then, used these favorable credit arrangements and loans to carry out the predatory scheme aimed at eliminating importer/distributors like Vollrath.[20] The financial arrangements between the three defendants are the heart of the case for plaintiff. If an analysis of these financial arrangements does not establish that Ken Carter was engaged in predatory pricing, plaintiff's case must fall.

Plaintiff relied entirely on the testimony of its expert witness Dr. John W. Buckley, an economist, to establish that Ken Carter's conduct was predatory in that its prices were below cost. Dr. Buckley calculated average variable

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[20] As evidence of the close affiliation of the parent corporations and their subsidiary, plaintiff established that the three presidents of Ken Carter following the acquisition—Sil D. Kim, Won In Rhee and James Kim—were all former Sammi employees. Stipulated facts 7 and 10. Also, Howard Kim, Ken Carter's import manager throughout most of 1983, had previously served as a sales manager for Sammi America and as the head of the export department for Sammi. Stipulated fact 8.

cost by adding: (1) the invoice price that Sammi charged Ken Carter, plus (2) Ken Carter's costs to import and sell the hollowware and Ken Carter's variable general and administrative expenses, plus (3) an "imputed interest" cost. This last component of average variable cost—imputed interest—was an estimate of the cost of funds made available to Ken Carter from Sammi and Sammi America to permit Ken Carter to purchase inventory from Sammi. To calculate imputed interest, Dr. Buckley multiplied, for each month, the dollar amount of Ken Carter's unpaid inventories by the interest rate on loans commercially available in the United States to corporations like Ken Carter for that month, the prime rate plus two points. Plaintiff's exhibits 701A and 720. Imputed interest, then, represents the cost that Ken Carter would have incurred if Ken Carter had been required to borrow money from banks in the United States in order to purchase inventory. Dr. Buckley testified that these interest costs were variable and that, based on a proper analysis of them, Ken Carter's prices to retailers for a select number of Ken Carter's hollowware products were below cost. See plaintiff's exhibits 701A at 7-A to 7-E; 701D at A-9 to A-10. Plaintiff's proof of sales below cost is based solely on Dr. Buckley's testimony regarding imputed interest.

[*Market Power*]

With respect to dangerous probability of success, plaintiff called an expert, Dr. William G. Shepherd, also an economist. He testified that stainless steel mixing bowls constituted a distinct submarket of the United States market for mixing bowls. He also testified that it was his understanding that "more or less all" stainless steel mixing bowls came from Korea in the period of time relevant to this case. Other witnesses called by the plaintiff gave anecdotal testimony to support Dr. Shepherd's conclusions. Record at 7-17. This testimony furnishes the basis for plaintiff's present contention that at trial it clearly established power in a relevant market.

Plaintiff's argument on market power is obscure, but seems to be that if stainless steel mixing bowls constitute the relevant submarket, and all these bowls came from Korea, "tracking" Sammi's share of the bowls exported from Korea must somehow establish Ken Carter's market power in the United States. Thus, despite the fact that Ken Carter was identified as the entity responsible for the predatory pricing, Ken Carter's share of the market for the distribution of stainless steel mixing bowls to retailers in the United States was not actually calculated, but rather estimated at about 10%, and the evidence of market power was focused instead on Sammi. Dr. Shepherd calculated Sammi's share of the Korean market export stainless steel mixing bowls to the United States, concluding that Sammi produced 40 percent of the bowls sold to importer/distributors in the United States. Record at 7-136 to 150; 8-64 to 74.[21] Presumably, the inference that plaintiff asked the trier of fact to draw was that Ken Carter engaged in predatory pricing as part of an attempt to extend Sammi's power into the market for the distribution of stainless steel hollowware in the United States. No extended analysis of the proof as to relevant market or market share is required or even possible. It is enough to

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[21] Vollrath argued that Sammi used its position as Korea's largest producer of stainless steel and as Korea's largest or second largest trading company to exploit the small manufacturers of hollowware in Korea. This argument represents pure speculation by Vollrath; there is no evidence that Sammi actually used its leverage over the small manufacturers. Assuming plaintiff's argument is correct, however, this fact would aid defendants' not plaintiff's case. If Sammi were able to reduce its costs for producing stainless steel bowls by leveraging its power as a supplier of steel and exporter of bowls, any anticompetitive harm would be suffered by the Korean hollowware manufacturers, not distributors such as Vollrath or American consumers. The harm to the small Korean manufacturers could not form the basis of an antitrust claim because "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita*, 475 U.S. at 582. Nor could Vollrath complain of harm to the small manufacturers, since Vollrath would suffer no injury therefrom. *Id.* at 583.

say that there was no proof of either. If plaintiff is to prevail, it must do so in the absence of proof of these elements.

a. *Sammi, Sammi America and Ken Carter acting as a single economic unit.*

Defendants object to plaintiff's attempt to aggregate the conduct of Sammi, Sammi America and Ken Carter.[22] Viewing each defendant separately, defendants claim that the only act by Sammi of which plaintiff complains was enabling Ken Carter to purchase hollowware on D/A terms; and the only act by Sammi America of which plaintiff complains was making loans to Ken Carter to enable it to purchase hollowware. Insisting that the corporate conduct of the three defendants be viewed separately, defendants argue that Sammi and Sammi America did not sell products below cost and cannot be found to have priced predatorily. They are able to make this argument because there is virtually no evidence that would warrant treating the three defendants as one excepting only their legal relationship to each other as parent and subsidiary. The fact of the existence of this relationship alone, however, does seriously impact the analysis of the predatory pricing issue in this case and requires examination.

In *Copperweld Corp. v. Independence Tube Corp.* [1984-2 TRADE CASES ¶ 66,065], 467 U.S. 752 (1984), the Supreme Court considered the applicability of Sher-

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[22] Defendants view the three corporations as separate and distinct entities whose acts cannot be attributed one to the other. Defendants have taken this same position in support of their argument that this Court cannot exercise personal jurisdiction over Sammi Corporation. Defendants have maintained throughout this litigation that Sammi does not have sufficient minimum contacts with California to be subject to suit here. Although this Court initially held that it did not have personal jurisdiction over Sammi, the Court later reversed itelf. Order Granting Plaintiff Vollrath's Motion to Reinstate Defendant Sammi Corporation, entered February 17, 1988.

man Act theories to parent corporations and their wholly owned subsidiaries. Although the Court in *Copperweld* articulated a narrow holding—"[a corporation] and its wholly owned subsidiary . . . are incapable of conspiring with each other for purposes of § 1 of the Sherman Act," *id.* at 777—the rationale of the case has broader implications. The holding in *Copperweld* builds on the

> basic fact that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit.

Id. at 772 n.18. Certainly, in the situation where the parent supplies the product and the subsidiary distributes the product, it is not unreasonable to infer that the parent and subsidiary are acting with a "unity of purpose"—*id.* at 771—to maximize profits on that product.

The evidence here was that Sammi, the parent, supplied the products, sold them to Ken Carter on D/A terms, and permitted its subsidiary, Sammi America, to make loans to Ken Carter to pay for the products. From these interrelated transactions the trier-of-fact could infer that the three defendant corporations had a working arrangement of some kind to market hollowware in the United States. From the parent/subsidiary relationship and this working arrangement, plaintiff argues that it is appropriate to treat Sammi, Sammi America and Ken Carter as a single economic unit for all purposes, including liability for predatory pricing.

Treating the defendants as a single economic unit, however, makes it impossible to accept Dr. Buckley's method of establishing that Ken Carter's prices were below average variable cost. The largest component of average variable cost as calculated by Dr. Buckley was the invoice price that Sammi charged Ken Carter for hollowware.[23]

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[23] On every hollowware item, Dr. Buckley's figures show that the invoice cost from Sammi to Ken Carter constitutes the major

For the purpose of a *predatory pricing case* against these three related defendants, however, the invoice price from Sammi to Ken Carter cannot be viewed in the same way as Sammi's invoice price to an unrelated entity. Obviously, an intracorporate transfer price may reflect profit to the parent/seller even as it reflects cost to the subsidiary/buyer. Thus, to establish the cost of the product to the single economic unit, the trier-of-fact would have to know what Sammi's margin of profit was. Presumably, Sammi did make a profit on the product because it is undisputed that it sold to Ken Carter's competitors at the same or lower invoice prices as it sold to Ken Carter. And, if it did, that profit logically should have found its way into Dr. Buckley's calculations. Certainly, treating the defendants as a single economic unit, Ken Carter's invoice price is far less relevant than Sammi's cost figure. Plaintiff did not, however, introduce any evidence as to Sammi's costs.[24] Thus, if the plaintiff's theory was that these defendants were acting as a single economic unit, Dr. Buckley's calculation fails to take into account the likely possibility that the single economic unit was making a profit overall.[25]

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component of average variable cost. Column "g" to plaintiff's exhibit 701A at 7-A to 7-E; and column "g" to plaintiff's exhibit 701D at A-9 and A-10.

[24] On cross-examination, Dr. Buckley testified:

"Q: [H]ave you tried to compute the average variable cost of Sammi Corporation's—

"A: No.

"Q: And would the same be true of Sammi America Corporation . . . . [Y]ou never tried to compute average variable cost . . .?

"A: That's correct."

Record at 6-177.

[25] Dr. Shepherd testified that after buying hollowware from the Korean manufacturers, importer/distributors generally marked up the price of the product 30 to 40 percent. This large mark-up suggests that the combined entity could have made money even if Ken Carter's mark-up was very small. Record at 8-75.

In determining whether there is harm to competitors and competition, it is losses on the *product*, not losses to the subsidiary, that the Sherman Act prohibits.[26] The

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[26] Citing *England v. Chrysler Corporation* [1974-1 TRADE CASES ¶ 74,931], 493 F.2d 269 (9th Cir. 1974), cert. denied, 419 U.S. 869 (1974), plaintiff argued, in opposition to the post-trial motions, that Sammi could be held liable under the antitrust laws for recklessly operating Ken Carter such that other distributors would be forced to function at an unprofitable level. In *England*, plaintiff Sunset Dodge—a privately owned Dodge dealer—sued Chrysler Corporation—the manufacturer of Dodge cars—and Van Ness Dodge—a Dodge dealer wholly owned by Chrysler. Sunset argued that Chrysler operated Van Ness in an effort to increase Chrysler's share of the automobile market. Although Chrysler turned a profit on all its sales, Chrysler allegedly subsidized Van Ness and operated Van Ness regardless of Van Ness' retail profit, thereby pressuring Sunset and other independent dealers to reduce prices. The Ninth Circuit assumed, without deciding that,

"the predominant emphasis on market penetration, which results in the deliberately reckless operation of a subsidized retailer and which has the inevitable effect of forcing competing and non-subsidized dealers to function at an unprofitable level, could, if proved, constitute an unreasonable restraint of trade."

Id. at 273. The court further stated that plaintiff would have to prove that the defendant parent deliberately determined to manage the subsidiary regardless of retail profit. Since Sunset failed to prove that Chrysler deliberately disregarded Van Ness' profits, the court entered judgment for defendants.

England does not aid Vollrath. First, *England* addressed only section 1 of the Sherman Act, stating that the reckless operation of a subsidiary may be an unreasonable restraint of trade. Under *Copperweld*, this theory is no longer valid; parents and their wholly owned subsidiaries cannot conspire in violation of section 1. Second, to the extent that Sammi could be accused of attempting to monopolize the market to distribute hollowware by reckless operation of Ken Carter, plaintiff, would be required to establish specific intent. *England*, however, held that reckless operation of a subsidiary is not a *per se* violation of section 1, nor a clearly predatory act. See also *Mt. Lebanon Motors, Inc. v. Chrysler Corp.* [1968 TRADE CASES ¶ 72,523], 283 F.Supp. 453 (W.D. Pa. 1968). Vollrath, then, would not be entitled to an inference of specific intent. Having failed to prove specific intent directly, any section 2 claim based on the theory assumed in *England* must fail. See *Marquis v.*

rationale of *Copperweld* impels the conclusion that a plaintiff should not be permitted to isolate the distributor/subsidiary transaction, treat the intracorporate transfer price as a real cost, add imputed interest because of financing by the parent, and hold the parent and the subsidiary both liable for the subsidiary's below cost pricing.[27] If Sammi had opted to run Ken Carter as a division, rather than as a subsidiary, Vollrath could not have made a case by showing that, while Sammi may have been making a profit on the production of the hollowware, the division was losing money on the sale of it. Under these circumstances, Vollrath would have been required to present its predatory pricing case in the light of economic reality. So should Vollrath have to do so here. "Antitrust liability [cannot] turn[] on the garb in which a corporate subunit [is] clothed." *Copperweld*, 467 U.S. at 773.

As stated, the defendants each have maintained throughout that their individual conduct must be viewed separately. Thus, the defendants did not introduce evidence of Sammi's costs either, viewing them as irrelevant in a case based on Ken Carter's costs. Defendants, of course, did not have the burden of establishing anything other than that plaintiff's economic theory was wrong. Plaintiff, on the other hand, chose this theory to prove its predatory pricing case, and it had the burden of treating the defendants in a manner consistent with the theory it selected. The difficulty is that if the plaintiff's theory was that the defendants were acting *together* as a single economic unit, there is a major flaw in Dr. Buckley's calculation: it treats

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Chrysler Corporation [1978-2 TRADE CASES ¶ 62,155], 577 F.2d 624 at 640 n.27, and 641 (9th Cir. 1978). See also *In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases* [1979-2 TRADE CASES ¶ 62,968], 478 F.Supp. 785 (N.D. Cal. 1979).

[27] Since Vollrath was purchasing almost all of its hollowware from other Korean trading companies—such as Hai Dong—and could have purchased from a number of others, this is not a price squeeze case.

the invoice price in a manner consistent only with their being *separate* and *unrelated*. For the purpose of analyzing the antitrust claims in this case, the fact that the three defendants are part of the same economic unit has significance. The transactions between them must be viewed in the light of that economic reality.

There is a further legal problem with Dr. Buckley's testimony. The predatory pricing claim stands or falls on the concept that interest must be imputed to transactions between parts of a single economic unit. In a proper case involving separate and unrelated entities, imputing interest in the calculation of cost might be warranted, but what are in effect subsidies extended by a parent to a subsidiary clearly require a different legal analysis. Parents can subsidize and extend favorable treatment to subsidiaries without violating the antitrust laws. A subsidy or favorable treatment extended to a subsidiary by a parent, without more, does not establish an antitrust violation. *England v. Chrysler Corporation*, 493 F.2d 269 (9th Cir. 1974), cert. denied, 419 U.S. 869 (1974).

b. *Sammi, Sammi America and Ken Carter acting as separate entities.*

In order to treat Sammi's invoice price as a true cost for the purpose of this predatory pricing case, Ken Carter must be treated as a separate and unrelated entity in its transactions with Sammi and Sammi America. An analysis of the plaintiff's arguments from this standpoint is necessary to be sure that no injustice is done in the evaluation of Dr. Buckley's testimony. However, even under this theory, plaintiff's claim of predatory pricing cannot be sustained.

In antitrust cases, "[r]ealities must dominate the judgment." *Appalachian Coals, Inc. v. United States* [1932-1939 TRADE CASES ¶ 55,025], 288 U.S. 344, 360 (1933). Therefore, to prove that a competitor set prices below cost, an antitrust plaintiff must calculate the *actual*

costs incurred by the would-be monopolist. Although an estimate of defendant's costs will always be imperfect, because "[e]conomics is an inexact science," *D&S Redi-Mix v. Sierra Redi-Mix and Contracting Co.* [1982-83 TRADE CASES ¶ 65,017], 692 F.2d 1245, 1248 (9th Cir. 1982), the plaintiff must, at a minimum, show that the defendant actually incurred the costs that plaintiff attributes to defendant. Thus, in *Matsushita*, the Supreme Court held that an expert's study had little probative value where the expert did not base "on actual cost data" his finding that defendants priced below average variable cost. 475 U.S. at 594 n.19. Given the inherently speculative nature of an allegation of predatory pricing, the Court dismissed the expert's calculations because they were "both implausible and inconsistent with record evidence." *Id.*[28]

Similarly, Dr. Buckley attributed to Ken Carter the cost of "imputed interest" even though Dr. Buckley repeatedly admitted that Ken Carter never incurred those costs.[29] Indeed, plaintiff did not offer any evidence to rebut the testimony of defendants' witnesses that Ken

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[28] The Ninth Circuit's reasoning in *D&S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982), also supports the insistence on actual costs. In *D&S Redi-Mix*, defendant concrete company's financial statements did not include the costs for equipment rental and materials used by defendant; plaintiff's economic expert, however, imputed these costs to calculate whether defendant had priced predatorily. The Court approved of the expert's methodology because there was no evidence that the actual "costs were other than as [plaintiff's] experts assumed." *Id.* at 1248.

[29] When asked, "[I]mputed interest is not something that Ken Carter actually pays; is that right?" Buckley responded, "Well, somebody paid for it. Money isn't free. So if [Ken] Carter didn't pay for it, Sammi[] paid for it or Sammi America paid for it. But it's all part of the cost of doing business." Record at 6-168; Plaintiff's exhibit 701C, Ref: MVCF-1 at S-4 "Evaluation of Ken Carter Industries' Financial Performance," (recognizing that Ken Carter was not required to pay interest on loans from Sammi America, rather Sammi America carried the interest).

Carter's interest payments on purchases from Sammi were included in the invoice price of the D/A contracts. Ignoring this reality, Dr. Buckley's estimate of interest double counted Ken Carter's costs by adding an additional amount of imputed interest to Sammi's invoice cost to Ken Carter. As to the loans from Sammi America to Ken Carter, the record evidence is undisputed that these loans were treated as investment capital; Ken Carter paid interest on only a portion of these loans. Again, Dr. Buckley's imputed interest calculations ignored the reality of the transactions, and attributed to Ken Carter interest payments on *all* the loans from Sammi America. Furthermore, Dr. Buckley used interest rates set by American banks for commercial loans. The only record evidence as to the actual transactions, however, is that Ken Carter paid Sammi America at a lesser rate. Dr. Buckley made no effort to calculate the actual amount of debt on which interest was required to be paid at the actual rate. Once defendants are viewed as separate and unrelated entities, then imputed interest, as a cost incurred by Ken Carter, is "inconsistent with record evidence" and should be excluded from consideration.[30]

Without imputed interest, every product in Ken Carter's hollowware line was priced above average variable cost, except for two mixing bowls and a colander in 1983, and a five-piece bowl set in 1984.[31] Plaintiff argues, nev-

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[30] This case presents an even stronger case for excluding the expert's calculation than *Matsushita*. In *Matsushita*, the Court based its understanding of defendants' actual costs on a single affidavit of one of defendants' officers. The Court granted summary judgment for defendants based on the failure to show an intent to price below costs. 475 U.S. at 594 n.19, aff'g *Zenith Radio Corp. v. Matsushita Elec. Industries Co.*, 505 F.Supp. 1313 (E.D. Pa. 1981). Here, the Court's understanding of the transactions at issue and of Ken Carter's costs are based on the full record at trial. Moreover, plaintiff's expert freely admitted that his cost estimates were not based upon debts Ken Carter actually incurred.

[31] Dr. Buckley calculated the various components of average variable cost for 18 Ken Carter products in 1983 and 19 Ken

ertheless, that the below cost pricing on these few items constitutes predatory conduct. This pricing behavior would be "economically senseless", however, and does not constitute substantial evidence of anticompetitive conduct and intent. *Matsushita*, 475 U.S. at 597-98. Plaintiff made no showing that the few products priced below cost in 1983 would "necessarily drive out rivals who were selling a full line [of hollowware]," as all of Ken Carter's competitors did. *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 856 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978). The record contains no evidence that the two bowls and the colander priced below cost in 1983 were particularly important products in the hollowware market. As to the five-piece bowl set priced below cost in 1984, plaintiff did introduce evidence that a retailer might select a holloware supplier based on the price of *similar* items.[32] Even assuming, however, that below cost, pricing of this single product could eventually drive competitors from the market, Vollrath contends that Ken Carter's price on the five-piece bowl set caused Vollrath to exit the entire hollowware market in a mere five months. The short duration of this below cost pricing cannot support an inference of predation. *William Inglis*

Carter products in 1984. Plaintiff's exhibit 701A, at 7-A to 7-E; exhibit 701D, at A-9 and A-10. To calculate average variable cost exclusive of imputed interest, the trier-of-fact would subtract column "l" from column "m." Comparing this figure to the average selling price for each item, column "c," only a few items are below average variable cost: the "CLD-13" colander, and "MB-2" and "MB-5" mixing bowls in 1983, and the "5108" five-piece bowl set in 1984.

[32] Harold Burgeson, a hollowware buyer for Montgomery Wards, testified that the key item in the Vollrath line in 1983 was a six-piece mixing bowl set; Burgeson stated that he might purchase the entire line based on the price of that item. Record at 7-42 to 43. Carol Storn, Vollrath's director of marketing, also emphasized the importance of the five-piece bowl set in securing accounts of retailers. Record at 4B-44, 51, 55 and 56. There was no testimony as to the amount a hollowware distributor would have to cut prices on a bowl set in order to win an account.

& Sons Baking Company, Inc., 668 F.2d at 1034 n. 29 (not all short-run pricing below average variable cost is predatory). Plaintiff also contends that it has proved that Ken Carter priced below average total cost, and that such pricing is sufficient to sustain the jury's verdict. Pricing below average total cost, however, is only anti-competitive if plaintiff establishes by other evidence that the pricing was predatory, *id.*; there is no substantial evidence in the record from which the inference can be drawn that Ken Carter intended anticompetitive consequences to flow from its pricing.

B. *Steamer blockage.*

As stated, it is plaintiff's position that the Korean Metal Flatware Association is a nongovernmental organization of flatware and hollowware manufacturers and exporters. Upon application, the Association may grant an exclusive export license for a particular product to a manfacturer or trading company. Sammi, as a trading company, and Daesung, a hollowware manufacturer, were co-owners of the export rights to a quart steamer. Vollrath showed that from October 1983 until January 1984 Sammi invoked its design registration rights to prevent Daelim from exporting the steamers to Vollrath. Record at 4-25; 5-181. Plaintiff contends that Sammi caused this delay of three months as part of its attempt to monopolize the United States market to distribute stainless steel, top-of-stove, free standing steamers.[33] Dr. Shepherd testified that these steamers could be treated as a distinct product and "in a sense" could be viewed as constituting "a market of their own." Record at 7-111.

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[33] Vollrath has argued that Sammi's anticompetitive intent in blocking the steamers is evidence of a specific intent to price below cost. The argument is that if Sammi had an intent to monopolize the market for steamers, a jury could infer that Sammi had intent to monopolize the market for bowls as well. The argument is untenable.

Plaintiff relies on *Handgards, Inc. v. Ethicon, Inc.* [1984-2 TRADE CASES ¶ 66,134], 743 F.2d 1282 (9th Cir. 1984), cert. denied, 469 U.S. 1190 (1985), for the proposition that Sammi's invocation of its design registration rights, like misuse of a patent, may form the basis of an attempted monopolization claim under section 2. *Handgards* makes clear, however, that the mere invocation of patent rights is not clearly predatory conduct from which a trier-of-fact is entitled to infer specific intent to monopolize.[34] Since Sammi's conduct was consistent with a legitimate concern to protect its design registration rights,

> [Vollrath] had to prove that the agents, officers, and directors of [Sammi] responsible for . . . maintaining the [objection to Daelim's export] were in possession of facts that prevented them from holding a good faith belief that the [steamer design registration rights] were valid.

Handgards, 743 F.2d at 1290. It is the knowing misuse of an inapplicable patent that makes the conduct anticompetitive, and a plaintiff must prove that knowledge and intent by direct or circumstantial evidence.

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[34] The concern in *Handgards*—that an attempt to enforce patent rights is not to be considered clearly predatory conduct—stems from an effort to reconcile the goals of the antitrust laws and the patent laws. A holder of a patent should neither be encouraged to invoke a patent to dampen competition, nor discouraged from invoking a patent out of fear of a claim of attempted monopolization. Thus, in *Handgards, Inc. v. Ethicon, Inc.* [1979-1 TRADE CASES ¶ 62,625], 601 F.2d 986, 996 (9th Cir. 1979), cert. denied, 444 U.S. 1025 (1980), the court held that a patentee's infringement action is presumptively in good faith, and to prevail on a Sherman Act claim, a plaintiff must prove, by clear and convincing evidence, that the patentee used the patent in bad faith, knowing the patent to be invalid.

Although this case concerns rights granted by the Korean Metal Flatware Association, not the United States Patent Office, some of the concern implicated in *Handgards* apply here. At a minimum, as a factual matter, the trier-of-fact cannot infer bad faith from defendant's invocation of legitimate design rights.

The record in this case contains no evidence to support a finding that Sammi's invocation of its design rights was in bad faith. Plaintiff made no effort to establish what criteria govern the scope of Sammi's design rights, whether Vollrath's steamer did or did not infringe on those rights, and whether Sammi's objection to Daelim's export was so lacking in merit that a trier-of-fact could infer that Sammi knowingly invoked an inapplicable patent. Instead, plaintiff was content to rely on the statements of several witnesses that they "liked" the Vollrath steamer better than the Ken Carter steamer.[35] In an antitrust context, this testimony is meaningless.

Having failed to prove that Sammi acted to intentionally abuse the rights granted by the Association, plaintiff claims that the operation of the Korean Metal Flatware Association itself violated the antitrust laws. Arguing from unsupported innuendo,[36] plaintiff attempts to portray the Association as an organization dominated by

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[35] For example, in an effort to prove that Sammi's design rights did not cover the Daelim steamer, plaintiff cites the testimony of Mr. Burgeson, a hollowware buyer for Montgomery Wards. Mr. Burgeson said that he "liked the look" of the Daelim steamer, that it "had a gourmetish flavor" and that other steamers "didn't appeal to [him] as much." Plaintiff's Opposition to Motion for JNOV at 24. Several Vollrath employees echoed Mr. Burgeson's preference for the Daelim steamer.

Despite the abundant testimony as to how Vollrath's steamer was aesthetically more pleasing than Sammi's steamer, plaintiff failed to introduce any evidence as to why Sammi's design rights would not cover the Vollrath product. Indeed, Vollrath's Manager of imported products, Ernest Keppler, candidly admitted that Vollrath and Daelim "weren't even thinking of design registration" in producing the competing steamer. Record at 5-170.

[36] For example, plaintiff argued that Mr. Park, a member of the Association, admitted that an "express purpose" of the Association was to "stop price competition." Plaintiff's Opposition to Motion for JNOV at 25. This is an outright distortion of Mr. Park's testimony; Mr. Park stated that the purposes of the Association were to ensure product quality and compliance with the laws against dumping. Record at 11-182.

Sammi's whims. Plaintiff contends that Sammi used its influence as a dominant trading company and steel supplier to intimidate Daelim into withholding export of the steamer to Vollrath. There is absolutely no evidentiary support in the record for this factual theory.[37] Even if plaintiff's accusation were true, however, Vollrath could not make an antitrust violation out of that one fact alone. There is no proof of harm to distributors or to competition in the United States from the temporary steamer blockage. The parties agree that Sammi offered to sell steamers to Vollrath at the same price charged to Ken Carter and numerous unaffiliated importer/distributors and on the same terms. On this state of the record, the harm to American consumers of steamers or the distributors selling those steamers is impossible to discern.[38]

IV. *Conspiracy.*

Copperweld establishes that a parent and its wholly owned subsidiary are legally incapable of conspiring with each other under section 1 of the Sherman Act. The *Copperweld* rule should be equally applicable to an allegation of conspiracy under section 2. *H.R.M., Inc. v.*

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[37] Indeed, plaintiff admits that the chairman of the Korean Metal Flatware Association during the time of the steamer blockage was the president of Daelim, the manufacturer of Vollrath's steamer. Record at 6-22 to 33. Yet Vollrath's attorneys insisted, without a shred of evidence, that Sammi's power in Korea was so great that even Daelim would collapse under Sammi's pressure or that Sammi controlled all of the other members of the board. Moreover, if Sammi had such power, there is no explanation in the record as to why Sammi relented and ultimately permitted the Daelim steamer to be shipped.

[38] If Sammi did have monopoly power over steel production and used that power to prevent Daelim from entering the market to produce stainless steel steamers, that conduct would certainly be anticompetitive in Korea. However, the "America antitrust laws do not regulate the competitive conditions of other nations' economies," *Matsushita*, 475 U.S. at 582. Thus, plaintiff would be required to prove how the harm to Daelim affected competition in the United States.

Tele-Communications, Inc. [1987-1 TRADE CASES ¶ 67,475], 653 F.Supp. 645, 648 (D. Colo. 1987). *Copperweld* recognized, however, that where separate corporations become affiliated in furtherance of an illegal conspiracy, common ownership and control do not protect subsequent action from scrutiny under section 1.467 U.S. at 761; see also *Rio Vista Oil Ltd. v. Southland Corp.* [1987-2 TRADE CASES ¶ 67,696], 667 F.Supp. 757, 761 (D. Utah 1987). To avoid the *Copperweld* prohibition against intra-corporate conspiracies, then, plaintiff contended that, prior to the acquisition, Sammi and Sammi America conspired with Ken Carter to price hollowware below cost.

Although plaintiff introduced evidence from which it could be inferred that Sammi and Sammi America had some sort of relationship with Ken Carter prior to the acquisition, there is absolutely no evidence that this combination had an anticompetitive purpose. Prior to the acquisition, Ken Carter purchased substantial amounts of inventory from Sammi, thereby incurring a debt as large as $2 million, and at times Ken Carter held itself out to be a division of Sammi or Sammi America. Plaintiff offered no evidence that either the debt or the relationship allowed Ken Carter to price its products below cost. In fact, there is no evidence of sales below cost in this pre-acquisition period. Nor has plaintiff identified any aspect of the acquisition documents that might tend to restrain or injure competition.

Instead, Vollrath relied on defendants' post-acquisition conduct to create an inference that Sammi America's intent in acquiring Ken Carter was to carry out a predatory pricing scheme. There is no other evidence from which such an inference could be drawn. As to the post-acquisition conduct, of course, plaintiff failed to introduce substantial evidence that Ken Carter actually set prices below cost at any time, or that Sammi and Sammi America operating through Ken Carter carried out a predatory scheme. Thus, if plaintiff's attempted monopolization

claim against the defendants fails, so must plaintiff's conspiracy claim. Second, even if Vollrath had succeeded on its attempted monopolization claim, plaintiff failed to offer any reason why a trier-of-fact could reasonably infer that there was any anticompetitive scheme in existence prior to the acquisition of Ken Carter by Sammi America. Sammi America purchased Ken Carter in November 1981, yet Ken Carter is not accused of engaging in predatory pricing until 1983. The only legitimate inference from the delay is that if defendants conceived of a scheme, they did so long after the acquisition. This is especially true since plaintiff has offered no explanation of how or in what way the acquisition could have aided defendants in their predatory pricing. There is nothing in the record to suggest that the defendants could do anything respecting pricing in 1983 that they could not have done in 1981, before the acquisition. Under these circumstances, the conspiracy claim under section 2 must fail.

V. *Robinson-Patman Act.*

A. *Legal Standard.*

In addition to its predatory pricing claims under sections 1 and 2 of the Sherman Act, Vollrath attempted to prove that Ken Carter sold hollowware at lower prices to certain retailers than to other retailers in an effort to take over accounts serviced by Vollrath; plaintiff contends that this discriminatory pricing violates section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). Although price discrimination and predatory pricing are governed by distinct statutes, it is critical to recognize that in this case, the two legal theories "are directed at the same economic evil and have the same substantive content." *Janich Bros.*, 570 F.2d at 855. Vollrath's price discrimination claim is merely a subpart of its predatory pricing claim; the predatory pricing claim is that Ken Carter generally lowered its prices to eliminate competition thereby attempting to gain a monopoly, and the discriminatory pricing claim is that

Ken Carter selectively lowered prices to accounts serviced by Vollrath to discipline or eliminate it from the market. Thus, the evil which the Robinson-Patman Act proscribes —where the alleged injury is to the competitors of the price setting firm (i.e. "primary-line" injury)—is the same evil proscribed by the Sherman Act: the setting of an "improper price." [39]

With this general consideration as a guide, Vollrath must prove several jurisdictional and substantive elements to prevail on its discriminatory pricing claim. First, plaintiff must establish that Ken Carter made two or more contemporaneous sales of like products to different retailers at different prices; and, at least one of the sales must have been made in interstate commerce. *Rutledge v. Elec. Hose & Rubber Co.* [1975-1 TRADE CASES ¶ 60,151], 511 F.2d 668, 677 (9th Cir. 1975). Mere price discrimination, however, does not violate section 2(a). Since selective price cutting to particular customers, like the lowering of prices generally, can be the essence or the antithesis of competition, section 2(a) distinguishes "between vigorous, but honest, price competition and predatory assaults on the competitive prices." *William Inglis,* 668 F.2d at 1042.

Therefore, plaintiff must also prove that the effect of the price discrimination

> may [have been] substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with [Ken Carter].

15 U.S.C. § 13(a). This requisite effect on competition may be inferred from evidence of predatory intent, or, in the absence of such evidence, from proof of predatory conduct. *William Inglis*, 668 F.2d at 1040-41. Because Vollrath's discriminatory pricing claim is a subpart of its

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[39] P. Areeda & H. Hovenkamp, *Antitrust Law: 1988 Supplement* 574 (1988).

predatory pricing claim, whether defendants' conduct will support an inference of predation is judged by the same analytical standards applicable to attempt to monopolize claims under section 2 of the Sherman Act. *Id.* at 1041.[40]

Finally, to prevail on a section 2(a) claim a, private plaintiff must establish that the discrimination caused actual harm to it. *J. Truett Payne Co. v. Chrysler Motors Corp.* [1981-1 TRADE CASES ¶ 64,013] 451 U.S. 557, 562 (1981).

B. *Plaintiff's proof.*

1. *Ken Carter*

The jury returned a verdict against both Sammi and Ken Carter on the discriminatory pricing claim. This claim is based solely on the claim that Ken Carter engaged in discriminatorily low pricing to Target stores, a retailer that had been a Vollrath account. Plaintiff introduced evidence that, in June 1983, Ken Carter sent price quotes to Target for over twenty hollowware items. Plaintiff's exhibit 110. On one of these items—The "5108" five-piece mixing bowl set—Ken Carter's offered price was less than average variable cost.[41] Target, however, did not actually purchase any hollowware from Ken Carter

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[40] Thus, the cost based test applicable to predatory pricing claims under the Sherman Act also applies to Robinson-Patman claims. A defendant's discriminatory pricing is presumptively predatory if the lower price set by defendant is below defendant's average variable cost; if the lower price is above average variable costs, however, the burden remains on plaintiff to prove that the price is predatory. Ultimately, however, the cost based test, as with the Sherman Act, merely serves to allocate the burden of proof on the issue of predation. A discriminatory price is predatory only if defendant justifies the price on the anticipated benefit of disciplining or eliminating competition.

[41] Compare Dr. Buckley's calculation of the average variable cost to Ken Carter of selling a "5108" set in 1983 (less imputed interest)—$6.27—to the price quoted to Target—$5.00. Plaintiff's exhibit 701A at C; plaintiff's exhibit 110.

in 1983. Plaintiff's exhibit 701C, "Summary of Carter's Sales of Relevant Products to its Major Customers," dated September 18, 1986, at 4.

Vollrath's vice-president of marketing, Carol Storn, testified that, in early 1984, Target pressured Vollrath to lower its prices. Vollrath responded by offering a special price on its own five-piece mixing bowl set for a Target promotional sale in March 1984. See plaintiff's exhibit 123. In its attempt to keep competitive, however, Vollrath was losing money on each shipment of bowls to Target, and in May 1984, Storn informed Target that Vollrath would increase its prices. In response to Vollrath's price increase, Target told Vollrath that Target would seek a new supplier.[42] During this same month, Vollrath made the decision to exit the hollowware distribution market.

Subsequently, Ken Carter secured the Target account. Although Carol Storn testified that Ken Carter may have made sales to Target in May or June of 1984, plaintiff offered evidence only of sales and the terms of sales from Ken Carter to Target beginning in late July 1984; there is substantial evidence that, from July through December 1984, Ken Carter sold its "5108" and "MBS-5C" bowl sets to Target at prices below the prices charged to other retailers. Plaintiff's exhibit 701C, "Summary of Carter's Sales of Relevant Products to its Major Customers," dated September 18, 1986, at 20-202. The prices offered to

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[42] The following is Storn's complete testimony as to these events:

"We had extreme pricing pressure from Target and had to lower our prices to them as a result of it. The ultimate result was that every time we made a shipment to Target we were losing money, and the next thing that I did—I went to see the buyer at Target in Minneapolis, and one of the things that I learned is that she was not going to add any other products to the line.

"They were strictly going to buy mixing bowls, and in effect that meant we had no opportunity to make up lost profits [on our mixing bowls], so I gave her a price increase. I was informed that they would look for another supplier and buy from us only if they had to, because they ran out of inventory in the meantime." Record at 4B-61.

Target on these two items were also below average variable cost.

Plaintiff's Robinson-Patman claim, if it is based on pricing pressure stemming from Ken Carter's *offer* to sell five-piece mixing bowls, fails to meet the jurisdictional requirements of the statute. Section 2(a) expressly requires that the price discrimination be based on two completed, contemporaneous sales, and "a mere 'offer' to sell to competing customers at different prices does not satisfy this requirement." *Foremost Pro Color, Inc. v. Eastman Kodak Co.* [1983-1 TRADE CASES ¶ 65,239], 703 F.2d 534, 547 (9th Cir. 1983), cert. denied, 465 U.S. 1038 (1984). Thus, plaintiff must base its Robinson-Patman claim on the actual sales that Ken Carter made to Target beginning in July 1984. If plaintiff relies on these sales to support its price discrimination claim, however, the price disparities cannot have caused any injury to Vollrath because it made the decision to exit the market, there is no evidence that Vollrath attempted to obtain the Target account, or any other retailer's account. Ken Carter's discriminatory pricing in 1984, then, did not cause Vollrath to lose the Target account. Plaintiff has no standing to recover for an alleged Robinson-Patman violation that did not cause it any harm. *J. Truett Payne*, 451 U.S. at 562.

Even assuming that the record contained substantial evidence that Ken Carter's discriminatory prices to Target caused Vollrath to lose the Target account, plaintiff did not establish the requisite effect on competition. Although Vollrath boldly claimed that the loss of Target "plunged" Vollrath into losses leading to the demise of the Consumer Products Division, the record does not support the claim that Vollrath's loss of the Target account could have resulted in an immediate decision to cease operations. Vollrath's price discrimination claim, at best, is based on the shifting of a single account from Vollrath to Ken Carter, with no resulting change in the number of importer/distributors in the market. *Foremost Pro Color*, 703 F.2d at 548 ("injury to a specific competitor is not

enough from which a court may infer that an alleged price discrimination may 'substantially' injure competition.")[43]

2. *Sammi.*

Plaintiff introduced absolutely no evidence that Sammi sold hollowware to different purchasers at different prices.[44] It is undisputed that Sammi sold its hollowware to other importer/distributors at the same prices charged to Ken Carter. Thus, there is no factual basis for holding both Sammi and Ken Carter liable under section 2(a) unless Ken Carter was engaged in discriminatory pricing and the acts of Ken Carter can be attributed to Sammi.

No facts have been established which would furnish a legal basis for attributing Ken Carter's pricing conduct with respect to Target to Sammi. All the record shows is that Sammi is a parent and Ken Carter a subsidiary in the same economic unit. Moreover, taking Sammi and Ken

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[43] Defendants also argue that judgment notwithstanding the verdict should be granted because Ken Carter proved that it was merely meeting competition by setting its five-piece bowl price at five dollars. Defendants' Reply to Opposition to Motion for JNOV at 23. It is an absolute defense to a charge of violating section 2(a) to show that defendant's pricing "was a good faith effort to meet price competition." *William Inglis*, 668 F.2d at 1045.

Although Vollrath's Carol Storn admitted that Target's buyer told her that National Silver had offered its five-piece bowl set for $4.90, a price lower than Ken Carter had offered, Record at 5-4 to 5, this testimony alone does not satisfy the demanding requirements for JNOV. Since the record does not reveal whether Ken Carter made its offer in response to National Silver or vice-versa, defendants have not established the meeting competition defense as a matter of law. *Id.*

[44] Plaintiff did not, and could not, allege that Sammi's sales of hollowware to Ken Carter on D/A terms contemporaneously with sales of hollowware to other importer/distributors on other terms violated section 2(a); a parent corporation may set prices more favorably to its subsidiary than to other buyers without violating the laws against discriminatory pricing. See *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.* [1985-2 TRADE CASES ¶ 66,796], 772 F.2d 214 (6th Cir. 1985).

Carter as part of a single economic unit, there is no evidence that defendants set prices below average variable cost.[45] The burden on predation, then, did not shift to defendants, and plaintiff was required to introduce other evidence that the pricing was predatory.

> However, no basis for establishing the requisite competitive injury, other than by proof of predatory intent and predatory pricing, is evident in the record before [the Court], nor has [Vollrath] argued one. Certainly, the mere fact that [Vollrath] suffered losses and eventually ceased operations is not sufficient to establish a section 2(a) Robinson-Patman Act violation.

William Inglis, 668 F.2d at 1042. Plaintiff did not do that. Thus, the Robinson-Patman claim cannot stand as to defendant Sammi.

VI. *California Unfair Trade Practices Act.*

The jury found Sammi and Ken Carter, but not Sammi America, liable for violating two provisions of the California Unfair Trade Practices Act: (1) the prohibition against sales below cost, Cal. Bus. & Prof. Code § 17043,[46] and (2) the loss leader provision, prohibiting a sale below cost of one product to induce purchase of a full line of products or to injure competitors, Cal. Bus. & Prof. Code § 17044.[47]

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[45] See *supra* Part II.A.2.a.

[46] Section 17043 states:

"It is unlawful for any person engaged in business within this State to sell any article at less than the cost thereof to such vendor . . . for the purpose of injuring competitors or destroying competition."

[47] Section 17044 states:

"It is unlawful for any person engaged in business within this State to seller [*sic*] use any article or product as a 'loss leader' . . . ." Cal. Bus. & Prof. Code § 17030 defines a "loss leader" as:

"any article or product sold at less than cost: (a) Where the purpose is to induce, promote or encourage the purchase of other

Although Dr. Buckley's study of Ken Carter's pricing practices, if accepted, is sufficient to prove that Ken Carter, in 1983, sold two bowls and a colander and, in 1984, sold its five piece mixing bowl set at less than cost,[48] there is no evidence in the record that these sales took place in California.[49] Thus, Vollrath has not proved a nexus between Ken Carter's pricing and any injury to Vollrath or to consumers in California.[50]

Furthermore, even if Ken Carter had violated the California Unfair Practices Act, there is insufficient evidence to support such a finding against Sammi. Sammi is a supplier of stainless steel hollowware; thus, whether Sammi priced below cost must be measured by its costs of suply-

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merchandise; . . . (c) Where the effect is to divert trade from or otherwise injure competitors."

[48] Cal. Bus. & Prof. Code § 17026 sets forth relevant definition of costs as to Ken Carter:

'Cost' as applied to distribution means the invoice . . . cost of the article or product to the distributor and vendor, plus the cost of dong business by the distributor and vendor."

[49] In fact, only one plaintiff witness even addressed California. Mr. Kashuk, an employee of Metro, a competitor of both Vollrath and Sammi, testified that Mervyns, a San Francisco retailer, refused to purchase hollowware from Metro because "[Mervyns could] continue to buy the goods from Ken Carter at 10 percent less than the price [Metro] had offered." Record at 3PM-84 to 86.

Kashuk's testimony only shows that Ken Carter offered to sell products below *Metro*'s costs, not Ken Carter's costs. Moreover, even assuming that this testimony could support a finding of injury to Metro, plaintiff Vollrath cannot rest its case on injury to a competitor.

[50] Plaintiff never attempted to identify particular sales affecting California. Rather, plaintiff claimed that since Ken Carter eliminated Vollrath from competition and Vollrath serviced retailers which operated nationally, California must have been affected. Plaintiff has failed to establish, however, that Ken Carter's anti-competitive acts eliminated Vollrath. Therefore, plaintiff must make a specific showing of harm to California to prevail on the pendent claims.

ing stainless steel hollowware.[51] There is no evidence on the record, however, as to Sammi's costs.

VII. *Conclusion.*

Antitrust cases must be predicated on economic realities. Here, however, palintiff eschewed the realities in favor of factual theories that were directly contradicted by actual circumstances. In an attempt to piece together a case, plaintiff picked and chose mismatched items of evidence which taken together do not present a coherent legal or factual theory. Actually, it is clear that the more mixed up and confusing the theories became, the easier it was for the jury to accept the kind of argument that was made in closing.[52] Plaintiff made that argument, of

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[51] Sammi's costs would differ from those of Ken Carter; Cal. Bus. & Prof. Code § 17026 states:

'Cost' as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer."

To the extent that Sammi and Ken Carter are treated as a single economic entity, it would be more rational to use the cost of production in lieu of the invoice cost applicable to distributors.

[52] Vollrath seized upon the nationalistic undercurrents of the dispute to sell its case to the jury. For example, in closing, plaintiff's attorney argued:

"What we are asking you to do is to find of course for Vollrath . . . but there is another message too. What we are really asking for is you [to] send a message to anyone who wishes to come into our country to do business here, people even in our country. Korea operates differently than us. You have heard Mr. Park testify that the design registration system committee concerned itself with price fixing. We don't do that in this country, at least not legally. That is fine. They can do that in Korea. When Koreans or anyone else come into this country [—] and we want them here—when they come here they ought to obey our laws. They ought to obey the laws we have here. They ought to know those laws and they ought to honor them. All we are asking is that you give us what we deserve, but also send a message to anyone who wants to come into this country that they better do business by our laws, our way, if they want to come here. And then we will have a marketplace that we are all happier with and all the choice and all the variety that we want. And that's what we are are seeking."

Record of Proceedings on April 4, 1989 at 35-36.

course, based on absolutely neutral facts. First, defendants are in a parent/subsidiary relationship with one another. Second, they are in fact part of a single economic unit. Third, Sammi supplied the product at issue here and Ken Carter distributed it. Fourth, Sammi America loaned large sums of money to Ken Carter to pay for the product. Fifth, Sammi had Korean design rights in a steamer. The difficulty is that these neutral facts, without more, cannot make Sammi and Sammi America liable for Ken Carter's acts, nor Ken Carter liable for Sammi's. There are, of course, various legal bases for the attribution of the acts of one defendant to another defendant, but in the antitrust context, the mere existence of a parent/subsidiary relationship—without more—is not enough to establish liability on the part of one for the acts of the other. Looking at the evidence in this case, the Court cannot find a basis for attributing the pricing conduct of Ken Carter to Sammi or to Sammi America. Nor can it find any basis for attributing Sammi's steamer blockage conduct to Ken Carter or Sammi America. The proof shows, at the most, only what appears to have been in effect subsidization by way of credit and loans to a subsidiary from a parent. With what intent this subsidization was carried on, the record is silent. The record is also silent with respect to proof of any of the requisite elements of an antitrust case on any theory in relation to the steamer blockage. The Court can only assume that the steamer incident was introduced as a makeweight to bolster the intent element of the predatory pricing claim.

The conspiracy allegations did not provide a basis for attributing the acts of one defendant to the other, because of *Copperweld*. To avoid *Copperweld*, plaintiff pieced together whatever it could find in an attempt to establish that Ken Carter was acquired to further the aims of an already existing conspiracy. To this end, evidence was offered to prove that prior to the acquisition of Ken Carter in 1981, Ken Carter had some kind of working relationship with Sammi, Sammi America and Ken Carter.

Yet, if the conspiracy existed prior to 1981, it was not until 1983 that Ken Carter is claimed to have sold any goods at prices below cost. In the fact of this reality, it is nevertheless plaintiff's position that Ken Carter's post-acquisition conduct proves that the conspiracy existed pre-acquisition. The fact that defendants did it in 1983 is offered to show that they conspired to do it before 1981. This kind of evidence is persuasive in many antitrust cases, but here it is pure surmise. If the post-acquisition predatory pricing proof is disregarded, the pre-acquisition proof does not establish a conspiracy. Since there cannot legally be one post-acquisition, plaintiff's conspiracy claims must fail.

The same trick with timing mentioned above also occurred with respect to the proof in support of the Robinson-Patman Act claim. Plaintiff asked the trier-of-fact to find that discriminatory priced sales made in July 1984 were the cause of Vollrath losing an account in May 1984, despite testimony by plaintiff's own witness that the retailer terminated Vollrath due to a price *increase* from Vollrath before May 1984. This is not a difference in timing of a few days; this is a crucial piece of evidence on causation, and it does not fit.

Mixing facts and theories appears in its most objectionable form in the proof of predatory pricing. Actually, the jury verdict may be credited to a talented economist who made the case by imputing interest on intra-corporate transactions between the defendants. The interest imputed between the parent and the subsidiary furnished the basis for the conclusion that some sales of some products had been below cost, and, thus, there had been predatory conduct. The predatory conduct furnished the basis for an inference that the defendants intended to control prices or eliminate competition as well as all the other elements of the plaintiff's claims. The whole case is based on imputed interest between a parent and a subsidiary. Yet, here too the theories do not go with the facts.

In a case in which the theory is that the supplier/parent is directing and subsidizing the predatory pricing conduct of the distributor subsidiary, it would seem clear that the cost to the economic unit engaged in the scheme should be the focus of the inquiry. On the other hand, the evidence in a given case might show that the parent was not involved in the predatory pricing. If so, a different calculation of costs, focussed on the subsidiary alone, would seem to be required. In short, the question of who is in on the scheme necessarily impacts how the predator's costs are to be calculated. Here, the theory was not that Ken Carter was going it alone, but that Sammi, Sammi America and Ken Carter were all in it together. Nevertheless, Dr. Buckley's calculation of Ken Carter's costs incorporates numbers appropriate for inclusion on both the theory that Sammi, Sammi America and Ken Carter were acting together, *and* on the theory that Ken Carter was acting alone. Both theories are included in the same calculation at the same time.

The most serious flaw in the plaintiff's predatory pricing theory remains for final mention: it is simply that a would-be monopolist confronting the market structure at issue in this case surely would be aware that he could not succeed. No matter how the market is defined—and certainly plaintiff did not define it—the ease of entry into it and the number of potential participants on every level of it abundantly demonstrate that recoupment by the monopolist would never be possible. This is the classic case for the application of the teaching of *Matsushita*.

The motion for judgment notwithstanding the verdict is granted.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-55201

D.C. No. CV-85-0820-MRP

THE VOLLRATH COMPANY,
Plaintiff-Appellant,
v.

SAMMI CORPORATION; KEN CARTER INDUSTRIES, INC.; SAMMISA (AMERICA) CORP.,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California

Before: HUG, NORRIS, and LEAVY, Circuit Judges.

The panel, as constituted in the above case, has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

[Entered January 13, 1994.]

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Court of Appeals Docket Number CA 90-55201

THE VOLLRATH COMPANY,
Appellant,

vs.

SAMMI CORPORATION, KEN CARTER INDUSTRIES, INC., and SAMMISA (AMERICA) CORP.,
Appellees.

Appeal from the District Court
Central District of California

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

INTRODUCTION

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, Plaintiff/Appellant the Vollrath Company ("Vollrath") hereby petitions for a rehearing of this Court's decision of November 29, 1993 and suggests that the rehearing be held *en banc*.

A reconsideration of this decision by the full court is necessary (1) to secure uniformity of the decisions of this Circuit and (2) to resolve the inconsistency between this decision and decisions of the United States Supreme Court on an issue of importance in the antitrust field.

More specifically, the opinion of this panel conflicts directly with two existing decisions of this Circuit with

respect to the imputation of costs in a subsidized predatory pricing scheme and with the established view of the Supreme Court with respect to the relationship between *per se* and "rule of reason" analysis in a conspiracy case.

There were two separate claims in this case. One involved a market division arrangement among members of an exporting cartel in Korea, which was used to block shipments of stainless steel products to the United States. The portion of the decision which conflicts with established Supreme Court law dealt with that claim. (See First Basis For *En Banc* Review, pages 2 through 7.)

The second claim involved a subsidized predatory pricing scheme operated from Korea, which affected a separate line of stainless steel products. The portion of the decision which conflicts with previous decisions of this Court dealt with that claim. (See Second Basis For *En Banc* Review, pages 7 through 11.)

FIRST BASIS FOR *EN BANC* REVIEW:

This panel's implicit determination that "*per se*" and "rule of reason" are separate legal theories under Sherman Act Section 1 contradicts the holdings of the United States Supreme Court in *FTC v. Indiana Federation of Dentists,* 476 U.S. 447 (1986) and *NCAA v. Board of Regents of Univ. of Oklahoma,* 468 U.S. 85 (1984).

Errors in Opinion

Error No. 1. "Vollrath also raises for the first time on appeal a contention that the restriction of output by Sammi was a 'naked restraint of trade' and a *per se* violation of Section 1 of the Sherman Act." (Opinion, page 13368)

Error No. 2. "Vollrath also argues on appeal that Sammi and nonparty Dae Sung engaged in a naked restraint of trade in Korea and that this constituted

> a *per se* violation of section 1 of the Sherman Act. This theory was not presented in the district court. . . ." (Opinion page 13375, note 4)

The Record: Vollrath presented to the jury evidence of a concerted effort by Sammi, Dae Sung, and the Korean Metal Flatware Association (the "association") to restrict the export of steamers to Metro and Vollrath. See e.g., District Court Memorandum of Decision, CR 240 at p. 35, L. 5-6: "Plaintiff claims that the operation of the Korean Metal Flatware Association itself violated the antitrust laws." See also facts with record citations in Vollrath's Opening Brief, pp. 13-14 (Sammi and Dae Sung restricting supply to Metro) and pp. 16-18 (Sammi and the association restricting supply to Vollrath). The district court, in *stipulated* instructions, properly instructed the jury with respect to the *per se* output restriction theory under Section 1 of the Sherman Act:

> "The plaintiff charges a violation of Section 1 of the Sherman Act . . . claiming that defendants engaged in an unlawful combination, contract, or conspiracy to restain trade in the market for . . . stainless steel steamers. . . ." (R.T. April 4, 1989, p. 19, L.15-20)
>
> "Before the jury may find that Sammi, Sammisa, and/or Ken Carter unlawfully combined together *with others,* a preponderance of the evidence must show that they knowingly participated in the combination with the intent to advance or further some object or purpose of the combination." (R.T. April 4, 1989, p. 29, L. 10-15) (emphasis added).
>
> "[I]n order for a plaintiff to prove an unlawful conspiracy, it must show either that the combination, contract, or conspiracy *included others than the defendants,* or. . . ." (R.T. April 4, 1989, p. 20, L. 12-15 (emphasis added).
>
> "Any unreasonable interference . . . with the ordinary, usual and freely competitive pricing or dis-

> tribution system of the open market in trade or commerce, among the several states *or with foreign nations* constitutes an unreasonable restraint of interstate trade, and is a violation of the federal antitrust laws." (*Id.* at p. 25, L. 6-12) (emphasis added).
>
> "Certain arrangements are deemed by their nature and necessary effect to be plainly anticompetitive so that no elaborate study of the industry is needed to establish their illegality and they are considered illegal *per se*. (R.T. April 4, 1989, p. 31, L. 6-9).

It is impossible to conclude that Vollrath did not present the Korean output restriction as a Sherman Act, Section 1 claim in the District Court.

Error No. 3. "On appeal, Vollrath seeks to expand the number of alleged conspirators to non-defendants, Dae Sung and the Korean Hollowware Association." (Opinion, page 13375)

The Record: The claim that Sammi, Dae Sung, and the association (all Korean entities) restricted exports from Korea to Vollrath and Metro is the only claim Vollrath has ever made with respect to restricting the output of stainless steel steamers. Vollrath has *never* claimed (in the district court or on appeal) that Sammisa (America) or Ken Carter (both of whom operate only in the United States) had anything to do with the restriction of steamer exports by the Korean companies and the association.

Argument

The question before the Court was whether the jury could have reasonably concluded that the output restriction violated Section 1 of the Sherman Act. The appeals panel declined to rule on this important issue, stating that the *per se* "theory" was not presented in the District Court. That statement, itself, is wrong. The record contains a full factual presentation of the output restriction, with extensive evidence from both sides, and a complete set of jury instructions, emphasizing that "certain ar-

rangements . . . are considered illegal per se." [The panel's misreading of the record may have been induced by the defense brief, which inserted comments about Sammisa (America) and Ken Carter into the output restriciton analysis. These U.S. companies had nothing to do with output restriction. They were involved only in the pricing scheme.]

More fundamentally, however, apart from the factual error, the appeals panel has misapprehended the relationship between *per se* and "rule of reason" analysis in an antitrust case under Sherman Act, Section 1. As the U.S. Supreme Court has made clear, these are not separate violations.

Every alleged antitrust violation is judged under the "rule of reason." *Per se* is simply a special instance of the "rule of reason," and is applied to certain arrangements (e.g., price fixing and agreements to restrict output) which are inherently anticompetitive and do not require elaborate industry analysis. There is no requirement, in a Sherman Act, Section 1 case, for separate counts directed to either *per se* or "rule of reason."

The analytical process, which combines *per se* and "rule of reason" analysis, is described and illustrated in the *NCAA* and *Indiana Federation* cases. Following are pertinent excerpts from those opinions.

NCAA CASE

> Both *per se* rules and the rule of reason are employed "to form a judgment about the competitive significance of the restraint." *National Society of Professional Engineers v. United States,* 435 U.S. 679, 692 (1978). A conclusion that a restraint of trade is unreasonable may be
>
> > "based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or pre-

> sumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions." *Id.* at 690 (footnotes omitted).
>
> *Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.

NCAA v. Board of Regents, supra at 103-104.

Indiana Federation Case

> [T]he Commission's failure to engage in detailed market analysis is not fatal to its finding of violation of the Rule of Reason . . . Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as *reduction of output,*" can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." 7 P. Areeda, Antitrust Law Para. 1511, p. 429 (1986) (emphasis added).

FTC v. Indiana Federation of Dentists, supra at 460-61.

In this case, Vollrath made a complete presentation of its Section 1 case against the Korean output restriction, an "inherently suspect" practice, and jury was given a complete instruction in accord with the principles outlined above. It would have been improper for Vollrath to have pleaded the *per se* part of the analysis separately, and the appeals panel departed from the principles of *NCAA* and *Indiana Federation* when it refused to consider the issue because the *per se* part of the analysis was not separately pleaded.

SECOND BASIS FOR *EN BANC* REVIEW:

> This panel's determination that costs cannot be imputed in a subsidized predatory pricing case under

the Sherman Act directly contradicts the Ninth Circuit's holdings in *D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982) and *In Re IBM Peripheral EDP Devices, Antitrust Litigation*, 481 F.Supp. 965 (N.D.Cal. 1979), *aff'd-subnom, Transamerica Computer Co. v. IBM*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983).

Errors in Opinion

Error No. 1. "Vollrath's claims of attempted monopolization are based upon two theories: (1) that Ken Carter engaged in predatory pricing of stainless steel mixing bowls. . ." (Opinion, page 13369)

The Record: Vollrath's claim (in the district court and on appeal) with respect to mixing bowl pricing was that *Sammi* (the prime defendant) engaged in a predatory pricing campaign by *subsidizing* Ken Carter (the pricing mechanism) with supply and credit arrangements which enabled Carter to sell Sammi's products below Carter's average variable cost. The purpose of the pricing campaign was to eliminate Vollrath and other United States distributors who purchased the products of Sammi's competitor, Hai Dong. See the District Court's Memorandum of Decision, CR 240, p.5, L.6-9: "Sammi and Sammi America are said to have enabled Ken Carter to set predatory prices by extending low-interest and interest-free credit and loans to it." See also CR 240 at p.17, L.19-p.18, L.1: "Specifically, plaintiff contended that Sammi funded the predatory pricing scheme by extending credit to Ken Carter through the favorable payment schedule provided by D/A contracts. Sammi America is also claimed to have funded the predatory scheme by extending low interest and interest free loans to Ken Carter to meet the D/A payments. Ken Carter, then, used these favorable credit arrangements and loans to carry out the predatory scheme aimed at eliminating importer/distributors like Vollrath."

Error No. 2. "The testimony [of Dr. Buckley, Vollrath's accounting expert] relied in large part on the concept of 'imputed interest,' which was an estimate of the cost of the funds made available to Ken Carter in order to permit Ken Carter to purchase inventory from Sammi. The crux of Dr. Buckley's testimony was that Ken Carter would have had to borrow money from other sources and pay for interest on the borrowed money in order to purchase the inventory.

Dr. Buckley's testimony, however, is insufficient as a matter of law. . . The absence of interest would only mean that Ken Carter received favorable treatment from Sammi, not that Ken Carter actually incurred a cost. Without proof that Ken Carter somehow incurred a cost, the concept of imputed interest is unsound." (Opinion, page 13371)

Comment: This conclusion is a non sequitur. By definition, "imputed" costs mean costs that are not incurred. That is why they are imputed. In effect, this panel has ruled that imputed costs can *never* be included in calculating the costs of a pricing entity. Such a holding directly contradicts the holdings in *D & S Redi-Mix* and *Transamerica, supra.*

Argument

The question before the Court was whether the jury could have reasonably concluded that Sammi's subsidized pricing program violated any part of the Sherman Act. The appeals panel apparently failed to recognize that this was a *subsidized* pricing case, which involves the cost imputation principles outlined in *D&S Redi-Mix* and *Transamerica.* As those cases explain, in a *subsidized* pricing case the "opportunity cost of the capital invested in the program will have to be estimated and imputed." *Transamerica, supra* at 1000 (Dist. Court Opinion). In *D&S Redi-Mix,* a case which is indistinguishable from this case in terms of cost subsidization issues, the defense took exactly the same position that the appeals panel has

adopted here, arguing that "the expert was not entitled to impute costs not reflected on the financial statements" of the subsidized entity (not actually incurred, as this panel put it). *D&S Redi-Mix, supra* at 1248. This contention was rejected by the *D&S Redi-Mix* Court, and the costs were imputed. The *D&S* Court specifically noted that "such arguments go to the weight of the expert's testimony, or his credibility" and are not "*proper subjects for review.*" (emphasis added)

Here, faced with exactly the same set of facts, the panel ruled that the expert's testimony "is insufficient *as a matter of law*" and that "the concept of imputed interest is unsound." (Opinion, page 13371) (emphasis added).

The effect of this decision is to overrule the Ninth Circuit precedents dealing with subsidized pricing and to place this Circuit in conflict with decisions in other circuits and established antitrust doctrine. See the following materials for full citations and discussion of these and other subsidization cases: Vollrath's OPENING BRIEF, notes 28, 35, and 38 (*D&S Redi-Mix*), page 42, incl. note 7 (*Island Tobacco v. R.J. Reynolds Industries,* 513 F.Supp. 726 (D. Hawaii 1976), page 42, note 48 (*Henry v. Chloride,* 809 F.2d 1334 (8th Cir. 1987), page 37, note 36 (*Transamerica* and *Allied Artists Pictures Corp. v. Rhodes,* 496 F.Supp. 408 (S.D. Ohio 1980), *aff'd* 679 F.2d 656 (6th Cir. 1982)); Vollrath's REPLY BRIEF, page 14, incl. note 9 (*Island Tobacco*) and *Tasty Baking Co. v. Ralston Purina, Inc.,* 653 F.Supp. 1250 (E.D. Pa. 1987) and pages 20-21 (*D&S Redi-Mix*).

For discussion of the concept of imputed interest in the treatises, see P. Areeda & H. Hovenkamp, *Antitrust Law,* Para. 712.1d (1989 Supp.): the cost of capital must be included in calculating cost "to the extent that operations are funded by capital generated internally or contributed by the owners of the firm."

The discussion in the opinion about measuring the entire cost structure of the subsidizer (in the case a Korean

steel trading company) is irrelevant.[1] The starting point in the cost analysis is the price to the subsidized entity. The cost of the subsidy is imputed, and the economic issue is whether the subsidizer is acting predatorily (i.e., whether the subsidizer carries the burden of demonstrating a competitive justification for the practice under *Aspen Skiing Company v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)). See the discussion in Vollrath's REPLY BRIEF, pages 22-23, quoting Areeda & Turner, who explain that where an integrated firm chooses to subsidize a downstream entity instead of earning a normal profit, the subsidizer may be embarking upon a predatory pricing campaign.

CONCLUSION

These are questions of importance, particularly in the international trade context (where subsidized pricing and cartel-like activity are most likely to occur). They deserve the attention of the full court.

December 11, 1993

Respectfully submitted,

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[1] Other, separate, costs of the subsidizer have nothing to do with the analysis. There was no consideration of such costs in *D&S Redi-Mix* or in any of the other subsidized pricing cases cited above.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Court of Appeals Docket Number CA 90-55201

DC #CV885-820 (MRP) (Kx)

THE VOLLRATH COMPANY,
Appellant,

VS.

SAMMI CORPORATION,
KEN CARTER INDUSTRIES, INC.,
and SAMMISA (AMERICA) CORP.,
Appellees.

CITATION UPDATING BRIEFS ON APPEAL

This Supplementary Citation Relates To:

VOLLRATH'S OPENING BRIEF:

STATEMENT OF ISSUES PRESENTED FOR REVIEW, ISSUE NO. 2, page 1;

ARGUMENT, POINT II, pages 19-28, *particularly* page 28, "Nationalistic Undercurrents"

VOLLRATH'S REPLY BRIEF:

THE POSTURE OF THE CASE AT THIS PLACE —The output restriction case, Page 1, *particularly* the second paragraph

REPLY ARGUMENT, POINT I, pages 3-13, *particularly* page 13, Final Comments—*Timberlane* doctrine

Hartford Fire Ins. Co. v. State of California and *Merrett Underwriting Agency Mgmt. Ltd. v. State of California* [consolidated cases], 1993 CCH Antitrust Trade Reg. Rep., Para. 70,280, Page 70,402 (June 28, 1993).

United States plaintiffs brought Sherman Act, Section 1 charges against domestic insurance companies and London-based reinsurance companies. The charges against the London-based companies involved actions taken in England which affected citizens in the United States. The London-based companies moved to dismiss on multiple grounds, including the doctrine of *Timberlane Lumber Co. v. Bank of America,* 549 F.2d 597 (9th Cir. 1976). The District Court for the Northern District of California granted the motion on that ground, among others. The Ninth Circuit reversed, applying the *Timberlane* analysis, but concluding that the principle of international comity was no bar to application of the Sherman Act.

The Supreme Court granted certiorari on the question, which was presented as follows:

> "The question presented in No. 91-1128 is: 'Did the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws in light of this Court's teachings and contemporary understanding of international law when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?' Pet. for Cert. in No. 91-1128, p. i."

Hartford, supra at note 9 on page 70,408. The discussion of this question is in Part III of the Majority Opinion, on pages 70,414-70,416.

The Court held:

- "The only substantial question in this case is whether 'there is in fact a *true conflict between domestic and foreign law.' Societe Nationale In-*

dustrielle Aerospatiale v. United States District Court, 482 U.S. 522, 555 (1987) (BLACKMUN, J., concurring in part and dissening in part)." *Id.* at 70,415 (emphasis added).

- " '[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws,' even where the foreign state has a strong policy to permit or encourage such conduct. Restatement (Third) Foreign Relations Law § 415, Comment *j*; see *Continental Ore Co., supra,* at 706-707. No conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.' Restatement (Third) Foreign Relations Law § 403, Comment *e*." *Id.* at 70,415-70,416.

- "Since the London reinsurers do not argue that British law *requires* them to act in some fashion prohibited by the law of the United States, see Reply Brief for Petitioners in No. 91-1128, pp. 7-8, or claim that their compliance with the laws of both countries is otherwise *impossible,* we see no conflict with British law. See Restatement (Third) Foreign Relations Law § 403, Comment *e,* § 415, Comment *j*." *Id.* at 70,416 (emphasis added).

A copy of the decision is attached.

Respectfully submitted,

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APPENDIX F

15 United States Section Code 1

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.